

United States 6
Circuit Court of Appeals

For the Ninth Circuit.

JAMES B. A. FOSBURGH, as Trustee of the
Estate of CONTINENTAL CANDY COR-
PORATION, a Corporation, Bankrupt,
Appellant,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY, a Corporation, THE
FIRST NATIONAL BANK OF SAN
FRANCISCO, CALIFORNIA, a Corpora-
tion, and CANTON BANK, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FILED

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN S. PARTRIDGE, Esq., Foxcroft Bldg., San Francisco,

IRA S. LILLYCK, Esq., Kohl Bldg., San Francisco, and

CHARLES LEROY BROWN, Esq., Chicago, Illinois,

Attorneys for Appellant.

DONALD Y. CAMPBELL, Esq., 216 Pine St., San Francisco, and

GARRET W. McENERNEY, Esq., Hobart Bldg., San Francisco,

Attorneys for Appellee, California & Hawaiian Sugar Refining Company.

H. U. BRANDENSTEIN, Esq., Mills Bldg., San Francisco,

Attorney for Appellee, Canton Bank.

CUSHING & CUSHING, First National Bank Bldg., San Francisco, California,

Attorneys for Appellee, First National Bank of San Francisco, a Corporation.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING CO., a Corporation, THE FIRST
NATIONAL BANK OF SAN FRANCISCO,
CALIFORNIA, a Corporation, and CAN-
TON BANK, a Corporation,

Defendants.

Bill of Complaint.

To the Honorable Judges of said District Court, in
Chancery Sitting:

Your orator, Continental Candy Corporation, plaintiff, a corporation organized and existing under the laws of the State of New York, and a citizen of said State of New York brings this, its Bill of Complaint against California and Hawaiian Sugar Refining Co. a corporation, The First National Bank of San Francisco, California, also a corporation, and Canton Bank, also a corporation, each of whom is a citizen and resident of the State of California, and of the District and Division aforesaid, and each of whom is hereby made a party de-

fendant to this bill, and your orator thereupon complains and alleges:

1. Continental Candy Corporation, hereinafter for convenience when referred to by name called "Continental Company," is, and was at all of the times hereinafter mentioned, a corporation organized and existing under the laws of the State of New York, [1*] a citizen of the State of New York, and having its principal office in said State of New York, and engaged, among other things, in manufacturing in the States of New York, New Jersey and Illinois, and in no other states, and also engaged in buying and selling sugar, as it was authorized to do by its charter and by license issued prior to May, 1920 (and then, and after May 18, 1920, in force) by the United States Sugar Equalization Board, an agency established by the President of the United States under and in pursuance of the Act of Congress of August 10, 1917, commonly known as the "Lever Act." And at all times hereinafter mentioned said plaintiff was, and is, engaged in interstate commerce.

2. California and Hawaiian Sugar Refining Co., hereinafter for convenience when referred to by name called the "Hawaiian Company," was at all the times hereinafter mentioned, and is, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen and resident of said State of California and of the District and Division aforesaid and engaged in the business of importing, manufacturing, buying and

*Page-number appearing at foot of page of original certified Transcript of Record.

selling of sugar. Said defendant Hawaiian Company was at all times hereinafter mentioned and is, engaged in interstate commerce, and in commerce with foreign countries.

3. The defendant First National Bank of San Francisco, California, was at all of the times hereinafter mentioned and now is, a corporation duly formed, organized and existing under and by virtue of the laws of the United States, and a citizen of the State of California, with its principal place of business in the City and County of San Francisco, in the State of California, and a resident of the District and Division aforesaid.

4. The defendant Canton Bank at all of the times hereinafter mentioned was, and now is, a corporation duly formed, organized and existing under and by virtue of the laws of the State [2] of California, and a citizen of the State of California, with its principal place of business in the City and County of San Francisco, in the State of California, and a resident of the District and Division aforesaid.

5. The amount of the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000) Dollars, and this suit and this controversy is between citizens of different states, and the matter in controversy arises under the laws of the United States; so that the above-entitled cause is, therefore, within the jurisdiction of this Honorable Court.

6. On May 14, 1920, plaintiff entered into a certain written contract with the defendant Hawaiian

Company, a true copy of which said contract is attached to this bill of complaint, marked Exhibit "A," and is hereby specifically referred to and made a part hereof the same as if the terms and conditions of said agreement were here fully alleged and set forth at length. Said contract was dated and was executed by plaintiff in the City of Chicago, State of Illinois, and the plaintiff there dealt with an agent of said Hawaiian Company, namely, Seavey & Flarsheim Brokerage Co., and after said contract was so executed by plaintiff in said City of Chicago, it was sent on by said Seavey & Flarsheim Brokerage Co. to defendant Hawaiian Company at the City of San Francisco, in the State of California, where it was accepted in writing by said defendant Hawaiian Company by its duly authorized officer and agent; and thereupon an executed copy thereof was delivered to plaintiff. Said contract of May 14, 1920, attempted to provide for the sale by said defendant Hawaiian Company, and the purchase by plaintiff, of 750 tons (each 2240 lbs.) 10 per cent more or less, white Java sugar, 25 Dutch Standard, 99° polarization, then at Java, at the agreed price of \$19.85 per 100 lbs. thereof net [3] cash, duty paid, landed weights, f. o. b. cars San Francisco, California; 250 tons thereof, 10 per cent more or less, to be shipped from Java during September, 1920, and 500 tons thereof, 10 per cent more or less, to be shipped from Java during October, 1920. And said contract provided for the manner of payment of the purchase price, thereof, and contained, as integral parts of said contract, divers

conditions and restrictions sought to be made binding upon the buyer and to be for the benefit of the seller.

7. On May 18, 1920, plaintiff entered into a certain written contract with the defendant Hawaiian Company, a true copy of which said contract is attached to this bill of complaint, marked Exhibit "B," and is hereby specifically referred to and made a part hereof the same as if the terms and conditions of said agreement were here fully alleged and set forth at length. Said contract was dated and was executed by plaintiff in the City of Chicago, State of Illinois, and the plaintiff there dealt with an agent of said Hawaiian Company, namely, Seavey & Flarsheim Brokerage Co., and after said contract was so executed by plaintiff in said City of Chicago, it was sent on by said Seavey & Flarsheim Brokerage Co. to defendant Hawaiian Company at the City of San Francisco, in the State of California, where it was accepted in writing by said defendant Hawaiian Company by its duly authorized officer and agent; and thereupon an executed copy thereof was delivered to plaintiff. Said contract of May 18, 1920, attempted to provide for the sale by said defendant Hawaiian Company, and the purchase by plaintiff, of 500 tons (each 2240 lbs.) 10 per cent more or less, white Java sugar, 25 Dutch Standard, 99° polarization, then at Java, at the agreed price of \$19.85 per 100 lbs thereof, net cash, duty paid, landed weights, f. o. b. cars San Francisco, California; to be shipped from Java during October, 1920. And said contract provided for the manner of pay-

ment of the purchase price thereof, and contained, [4] as integral parts of said contract, divers conditions and restrictions sought to be made binding upon the buyer and to be for the benefit of the seller.

8. Subsequently each of the contracts mentioned in paragraphs 6 and 7 hereof were amended and modified by the agreement of both parties thereto, so that the words, "f. o. b. cars Crockett, California," were substituted in lieu of "f. o. b. cars San Francisco, California"; each of said last mentioned contracts being otherwise unchanged.

9. Prior to the amendment and modification of said contracts mentioned in paragraph 8 hereof, plaintiff, in pursuance of the terms of said contracts, procured from the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of the State of Illinois, and from Great Lakes Trust Company, a banking corporation, organized under the laws of the State of Illinois, and a citizen and resident of the State of Illinois, certain irrevocable Letters of Credit, authorizing said defendant Hawaiian Company to draw on the respective banks issuing said letters, certain specified sums aggregating the purchase price of said sugars fixed by said contracts mentioned in paragraphs 6 and 7 hereof. The terms of said letters of credit are hereinafter more fully stated in paragraphs 10 and 11 hereof. Said banks issuing said irrevocable letters of credit did so without knowledge by them, or either of them, of all the terms of said contracts

of May 14, 1920, and of May 18, 1920, and plaintiff is bound by its separate contracts with said First National Bank of Chicago and Great Lakes Trust Company, respectively, to repay to each of said last mentioned banks any sums advanced by it under its said letter of credit. Said First National Bank of Chicago and Great Lakes Trust Company are not necessary parties hereto, and neither of them is made a party hereto because neither [5] of them is within the jurisdiction of this Court and process of this Court cannot be served upon either of them.

10. On June 2, 1920, said First National Bank of Chicago issued to said defendant Hawaiian Company its letter of credit in the sum of \$300,000, authorizing said Hawaiian Company to value on the First National Bank of Chicago at sight for any sum or sums not exceeding in all \$300,000, for account of plaintiff, on shipment by said defendant Hawaiian Company of portions of the sugar agreed to be sold by it in said contracts of May 14, 1920, and May 18, 1920, provided said sugar was of specified quality, grade, test and character, being the same as specified in the contracts mentioned in paragraphs 6 and 7 hereof, and provided the quantity of sugar on account of which the draft is drawn be shipped f. o. b. San Francisco, duty paid, and provided the Hawaiian Company's bill, or bills, be drawn on or before December 31, 1920, and accompanied by bill of lading and abstract of invoice, on receipt of which documents the letter declared the bills would be duly honored, and provided that shipment of 250 tons of said

sugar from Java be in September, 1920, and shipment of 1,000 tons of said sugar from Java be in October, 1920. Said letter of credit was declared to be confirmed and irrevocable. Said First National Bank of Chicago further agreed by said letter of credit with drawers, endorsers, and *bona fide* holders of drafts drawn under and in compliance with said letter of credit, that the said drafts would be duly honored upon presentation at the counter of said First National Bank of Chicago. And said letter of credit further provided that, if desired, drafts drawn under said letter of credit would be paid at the counter of the First National Bank of San Francisco, California. Subsequently to June 2, 1920, and by agreement between the First National Bank of Chicago and said defendant the First National Bank of San Francisco, California, and by agreement between plaintiff [6] and said defendant Hawaiian Company, said letter of credit was altered and modified so as to provide that delivery of said sugar was to be f. o. b. cars Crockett, California, instead of f. o. b. cars San Francisco, California.

11. On June 1, 1920, said Great Lakes Trust Company issued to said defendant Hawaiian Company its letter of credit in the sum of \$255,800, authorizing said Hawaiian Company to value on the Great Lakes Trust Company at sight for any sum or sums not exceeding in all \$255,800, for account of plaintiff, on shipment by said defendant Hawaiian Company of portions of the sugar agreed by it to be sold by said contracts of May 14, 1920,

and May 18, 1920, provided said sugar was of a quality, grade, test and character specified in said letter of credit the same as required by the contracts mentioned in paragraphs 6 and 7 hereof, and provided the quantity of sugar on account of which the draft is drawn be shipped from San Francisco, duty paid, and provided the Hawaiian Company's bill or bills, be drawn on or before December 31, 1920, and accompanied by clean railroad bills of lading and invoices in triplicate, on receipt of which documents the letter declared the bills would be duly honored, and provided that shipment of said sugar from Java be in September, and/or October, 1920. Said Great Lakes Trust Company further agreed by said letter of credit with drawers, endorsers, and *bona fide* holders of drafts drawn under and in compliance with said letter of credit, that the said drafts would be duly honored upon presentation at said Great Lakes Trust Company. And said last-mentioned letter of credit further provided that drafts under it might be negotiated, if desired, with the Canton Bank of San Francisco, California. Subsequently to June 2, 1920, and by agreement between Great Lakes Trust Company and said defendant Canton Bank, and by agreement between plaintiff and said defendant Hawaiian Company, said letter of credit was altered and modified [7] so as to provide that said sugar was to be shipped from Crockett, California, instead of from San Francisco, California.

12. Each of said contracts mentioned in paragraphs 6 and 7 hereof provided for transactions in

trade or commerce among the several states of the United States and with a foreign nation, and each related to articles intended to be imported into the United States from a foreign country. And each of said last-mentioned contracts provided for the shipment of articles to the United States from Java, which is part of a foreign country, and said defendant Hawaiian Company intended, as principal, to import the said sugar so to be shipped from Java into the United States.

13. Each of said contracts mentioned in said paragraphs 6 and 7 hereof provided that plaintiff should use the sugars covered by each of said contracts of sale only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, and it was further provided by each of said contracts that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the defendant Hawaiian Company from what was spoken of as the delivery date of such sugar until the end of the year 1920. The said last-mentioned provisions and conditions, and the whole and entire agreement of sale between plaintiff and said defendant Hawaiian Company, contained in each of said contracts of May 14, 1920, and May 18, 1920, were, and are, illegal, null and void, for the reason that said restriction against, and said forbidding of, the resale of said sugar, or any part thereof, by plaintiff, as well as the forbidding of the sale of any more or other sugar in addition to the amounts and quantities specified in said contracts of May 14, 1920 and

May 18, 1920 by defendant Hawaiian Company to plaintiff, prior to the end of the year 1920, were, and are, in unlawful and unreasonable restraint of trade, both between the parties to said contracts themselves, and [8] in regard to the public at large. And said last-mentioned provisions of said contract were in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade or free competition in lawful trade or commerce of any articles imported or intended to be imported into the United States. Each of said contracts of sale, and the terms and conditions thereof, were in such unreasonable and unlawful restraint of trade as to be at variance with and contrary to public policy and interest, and are unreasonable and detrimental to plaintiff and to the interest and policy of the public at large. The said restraint of trade embodied in and effected by the said contracts of sale and the terms and conditions thereof are in unqualified restriction of trade in a necessary commodity dealt with in trade and commerce among the several states, and are, for that reason, illegal and fraudulent, and effect a withholding and removing of said necessary commodity from the public market and from the public use and restrict the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for said necessary commodity and a monopolistic inflation and raising of prices of and for the same.

14. Each of said contracts mentioned in paragraphs 6 and 7 hereof is entirely and wholly illegal and void because each contains provisions constituting integral parts of each of said contracts and providing that all disputes and controversies under each of said contracts should be finally settled by a prescribed arbitration, extra-legal in character, the effect of which provisions was and is to oust the courts of jurisdiction, and said provisions were, and are, contrary and inimical to the public interest and welfare. [9]

15. At and before the time of the entering into of said contracts mentioned in paragraphs 6 and 7 hereof said plaintiff questioned the agent of said defendant Hawaiian Company negotiating the said contracts as to the presence and inclusion of the said terms and conditions referred to in paragraphs 13 and 14 hereof, and protested their inclusion in said contracts and each of them, but said plaintiff was informed by said agent of said defendant Hawaiian Company which said agent was duly authorized to represent said last-mentioned defendant with respect thereto, that plaintiff could purchase the said sugar, or any other sugar of like quality or kind, only under forms of contract embodying therein the said terms and conditions, including the terms and conditions mentioned in paragraphs 13 and 14 hereof, and thus, in order to effect a purchase of sugar, plaintiff was thereby forced to execute and enter into the said contract of sale embodying the said terms and conditions hereinabove mentioned in paragraphs 13 and 14.

16. Each of said contracts mentioned in paragraphs 6 and 7 hereof was and is unilateral and without mutuality in that each gave defendant Hawaiian Company the privilege of cancelling the contract if strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevented shipment or delayed delivery of said sugar, and each of said contracts was therefore a *nudum pactum* and unenforceable.

17. Neither of said contracts mentioned in paragraphs 6 and 7 hereof provided for any date of delivery of said sugar to the buyers f. o. b. cars San Francisco, California, or as each of said contracts was later modified and amended, f. o. b. cars Crockett, California, and while each of said contracts contained provisions as to the date when shipments were to be made from Java to the United States, neither contained any provision whatever for the time of delivery of said sugar from the possession and control of said [10] defendant Hawaiian Company to the possession and control of said plaintiff; so that each of said contracts was and is in law terminable on reasonable notice from one party to the other prior to delivery from the buyer to the seller. As hereinafter more fully stated, plaintiff has given notice to said defendant Hawaiian Company of the termination and cancellation of said contracts dated May 14, 1920, and May 18, 1920, and each of them.

18. Said defendant Hawaiian Company has not complied with the material provision of said contract of May 14, 1920, between it and plaintiff re-

quiring said Hawaiian Company to ship 250 tons of sugar from Java during the month of September, 1920, but on the contrary has caused an unknown quantity to be shipped from Java on a vessel which, by its accustomed itinerary of voyage, left one port of Java on September 30, 1920, bound for other islands and then returned to another port of Java and did not leave said last-mentioned port of Java until well into the month of October, 1920, as your orator is informed and believes, and upon such belief, occasioned by such information, plaintiff has rescinded the entire contract of May 14, 1920, as more fully hereinafter stated.

19. Prior to the filing of this bill of complaint plaintiff has served upon said defendant Hawaiian Company at San Francisco, California, written notices advising and notifying said defendant Hawaiian Company that plaintiff has rescinded each of the contracts mentioned in paragraphs 6 and 7 hereof for fraud and illegality, that it treats and regards each of said last-mentioned contracts as void and unenforceable, and that it terminates each of said contracts by reason of the indefiniteness of the time of performance thereof by said defendant Hawaiian Company and by reason of no delivery having yet been attempted under either of said contracts, and also notifying and advising the said defendant [11] Hawaiian Company that plaintiff has rescinded the entire contract of May 14, 1920. by reason of the noncompliance by said defendant Hawaiian Company with the material provision of said contract of May 14, 1920, requiring

250 tons of said sugar to be shipped from Java during the month of September, 1920.

20. Your orator is informed and believes that a large quantity of sugar, perhaps sufficient to include the quantity covered by said contracts between plaintiff and defendant Hawaiian Company, has arrived in San Francisco by vessels arriving on the 23d day of November, 1920, and thereafter, and that the defendant Hawaiian Company, notwithstanding the receipt by it of notice of cancellation and rescission of said contracts of sale heretofore served upon it by plaintiff, as set forth in paragraph 19 hereof, and notwithstanding the illegality and voidness of said contracts of sale, is about to tender and offer to plaintiff part of the said sugar which has arrived in San Francisco, or the whole thereof, and is about to present to said defendants, The First National Bank of San Francisco, California, and Canton Bank, the papers and documents required in and by the said irrevocable letters of credit as hereinbefore alleged, and is about to value on and under said letters of credit and thereby obtain payment in full of and for the 750 tons of sugar covered by said contract of May 14, 1920, and of and for the said 500 tons of sugar covered by said contract of May 18, 1920, or for portions of said 1250 tons; and that the said defendant The First National Bank of San Francisco, California, and Canton Bank, are, upon presentation of drafts under said letters of credit, accompanied by the required papers and documents, about to pay to said defendant Hawaiian Company the full purchase

price of and for all or large parts of the sugar covered by said contracts of May 14, 1920, and May 18, 1920.

21. By reason of the fact that defendant Hawaiian [12] Company in and by said contracts of sale between it and plaintiff has demanded that plaintiff establish said irrevocable letters of credit, as hereinbefore set forth, and by reason of the fact that said irrevocable letters of credit so established by plaintiff, as hereinabove alleged, are still in full force and effect, and are irrevocable, and plaintiff is therefore unable to stop payment of said purchase price of and for said sugar and the whole thereof under said irrevocable letters of credit by the said defendant The First National Bank of San Francisco, California, and Canton Bank, as hereinbefore alleged, plaintiff is unable to prevent the enforcement and carrying out of said illegal, null and void contracts of sale, or either of them, and unable to prevent the payment of the purchase price of and for said sugar thereunder, unless the said defendant, California and Hawaiian Sugar Refining Company, and the said defendants, The First National Bank of San Francisco, California, and Canton Bank, are enjoined and restrained from receiving or making payment of the said purchase price for said sugar and any part thereof under said irrevocable letters of credit or either of them.

22. Unless said injunction be granted plaintiff will sustain and suffer irreparable injury in that, if drafts be drawn under said letters of credit and

are honored and paid, plaintiff will be at once compelled to pay to said First National Bank of Chicago and Great Lakes Trust Company the amounts of said drafts, which may aggregate \$555,-800, notwithstanding plaintiff will have received nothing under said contracts, and in that it would be necessary for plaintiff to proceed to the State of California, of which plaintiff is a nonresident, in order to sue at law said defendant Hawaiian Company for damages, to the great annoyance and expense of plaintiff, and with the loss of the use of said vast sums of money covered by said letters of credit, which loss [13] of use would seriously jeopardize its financial strength during the pendency of an action to recover damages, and in that, moreover, if such action to recover damages be instituted and maintained said defendant Hawaiian Company could, and your orator is informed and believes, would, contend that in so far as plaintiff's right of action depended on a claim by plaintiff that said contracts of May 14, 1920, and May 18, 1920, were illegal and contrary to public policy, said right of action could not be maintained because, on the part of the said defendant Hawaiian Company, it was an executed contract and because a court of law would not lend its aid to recover back money paid on a contract illegal and contrary to public policy, and said defendant Hawaiian Company could contend that in so far as such right of action of plaintiff depended on claims by plaintiff that each of said contracts was *nudum pactum* or terminable by plaintiff on reasonable notice, the procuring of

issuance of letters of credit by which payments were effected was the result of a mistake of law by plaintiff which would preclude recovery of damages sustained by it as a result of payments of the purchase price fixed by the said contracts of May 14, 1920, and May 18, 1920. And so, unless the injunction herein prayed for be granted, plaintiff may be subjected to great loss and damages without any redress or relief whatever on account thereof, and therefore plaintiff is without recourse save in a court of equity.

23. If notice of the application for a temporary restraining order be given to the defendants plaintiff will, it believes, suffer immediate and irreparable loss or damage before the matter can be heard by this honorable Court on notice, for the reason that large parts of the sugar covered by said contracts of May 14, 1920, and May 18, 1920, are already unloaded from said vessels and about to be shipped on railroad cars, so that it would be the work of but a few minutes for said defendant Hawaiian [14] Company to value or draw drafts under said letters of credit and to present them for payment, and said last-mentioned defendant, will, plaintiff believes, so value or draw drafts, if notice of said application be given any of said defendants, and said other defendants will then honor and pay said drafts, to the irremediable loss and damage of plaintiff as hereinbefore set forth.

WHEREFORE plaintiff prays:

First. That the said defendant, California and Hawaiian Sugar Refining Co., its officers, servants,

members, and agents, and all other persons acting with or for it, or aiding or assisting it, be enjoined, pending the trial of this suit, from delivering to plaintiff, or offering to deliver to plaintiff the said sugar, or any part thereof, and from valuing or drawing under the letters of credit hereinabove mentioned, and from negotiating or assigning any drafts so drawn under said letters of credit, and from taking or receiving payment from said defendant, The First National Bank of San Francisco, California, and/or the defendant, Canton Bank, or from the said First National Bank of Chicago, or from said Great Lakes Trust Company, of the said purchase price of and for said sugar, or any part thereof, under said letters of credit, or any of them and that said defendant, The First National Bank of San Francisco, California, and/or the said defendant, Canton Bank, their respective officers, servants, agents, and members, and all other persons acting with, or aiding or assisting them, or any of them, be enjoined, pending the trial of this suit, from paying the said defendant, California and Hawaiian Sugar Refining Company, the said purchase price of and for said sugar or any part thereof, under said letters of credit, or either of them.

Second. That a restraining order be issued and be in full force and effect and binding upon and against each and all of said defendants above named, restraining and enjoining them, [15] as hereinabove prayed and set forth, from the time

that said defendants shall have knowledge of the existence of said restraining order.

Third. That upon the final hearing of this cause the injunction prayed for in the first prayer hereof may be made permanent.

Fourth. That the said contracts of sale of May 14, 1920, and May 18, 1920, between plaintiff and defendant, California and Hawaiian Sugar Refining Co., be declared illegal, null and void, cancelled and rescinded.

Fifth. That, in the event payment of and for the purchase price of said sugar, or any part thereof, shall have been effected and consummated between said defendants, or between any of them, or between any said defendants and said First National Bank of Chicago and said Great Lakes Trust Company, prior to the commencement of, or pending, this action, that the full amount of said payments so effected and consummated be decreed to be returned to plaintiff, and that defendant California and Hawaiian Sugar Refining Co. be decreed to reimburse plaintiff for any loss or damages which plaintiff may suffer by reason of any acts unlawfully and improperly performed by said defendant California and Hawaiian Sugar Refining Co. under said illegal, void and rescinded contracts.

Sixth. That the defendants and each of them be required to answer this bill of complaint, but not under oath, answers under oath being hereby expressly waived.

Seventh. That the Court may fully ascertain and declare the rights of all the parties in and to the subject matter of this controversy and suit, and that the Court may grant such other and further relief to plaintiff as to your Honors may seem meet [16] and equitable in the premises.

And your orator will ever pray, etc.

IRA S. LILLICK,

CHARLES LeROY BROWN,

Attorneys for Plaintiff. [17]

Exhibit "A."

Kansas City, Mo.

Chicago, Ill.

Omaha, Neb.

St. Joseph, Mo.

Minneapolis, Minn.

St. Louis, Mo.

Wichita, Kans.

St. Paul, Minn.

Davenport, Iowa.

DUPLICATE.

SEAVEY & FLARSHEIM BROKERAGE CO.

U. S. Food

Adminis-

tration

License

No. G-02928

326 West Madison Street,

Chicago, Ill.

CONTRACT

In Triplicate.

May 14, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars:

750 tons, each 2,240 lbs. 10% more or less,
White Java Sugar at \$19.85, net cash, duty
paid, landed weights, FOB cars San Fran-
cisco, California; 25 Dutch Standard—99 Pol-
arization.

250 tons, 10% more or less, shipment from
Java September, 1920.

500 tons, 10% more or less, shipment from
Java October, 1920.

2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

4. Any change of import duty understood to be for account of buyer.

5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION.

BEN SCHNEEWIND,
President.

Confirmed and accepted.

(Seller) CALIFORNIA AND HAWAIIAN
SUGAR REFINING CO.

L. CAMPIGLIA,

Assistant Sales Manager. [18]

Exhibit "B."

Kansas City, Mo.

Chicago, Ill.

Omaha, Neb.

St. Joseph, Mo.

Minneapolis, Minn.

St. Louis, Mo.

Wichita, Kans.

St. Paul, Minn.

Davenport, Iowa.

DUPLICATE.

SEAVEY & FLARSHEIM BROKERAGE CO.

326 West Madison Street,

U. S. Food

Adminis-

tration

License

No. G-02928

Chicago, Ill.

CONTRACT.

In Triplicate.

May 18, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Illinois, have to-day bought the following sugars:

500 tons, each 2,240 lbs. 10% more or less, White Java Sugar, at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California, shipment from Java during October, 1920; No. 25 Dutch Standard, 99 Polarization.

2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being

delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

4. Any change of import duty understood to be for account of buyer.

5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION.

BEN SCHNEEWIND,

Confirmed and accepted.

(Seller) CALIFORNIA & HAWAIIAN
SUGAR REFINING CO.

L. CAMPIGLIA,

Asst. Sales Manager. [19]

State of California,
City and County of San Francisco,—ss.

Frank J. King, being first duly sworn, deposes and says: That he is an officer, to wit, the Assistant Secretary, of Continental Candy Corporation, a corporation, named as plaintiff in the foregoing action, and, as such, is duly authorized to make this verification on behalf of said plaintiff; that he has read the foregoing bill of complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information or belief, and that, as to those matters, he believes it to be true.

FRANK J. KING.

Subscribed and sworn to before me this 1st day of December, 1920. .

[Seal]

J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 1, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

(Subpoena Ad Respondendum.)

UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

IN EQUITY

The President of the United States of America,
GREETING: To California and Hawaiian Sugar Refining Co., a Corporation, the First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation.

YOU ARE HEREBY COMMANDED, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Second Division, aforesaid, at the courtroom in the City of San Francisco, twenty days from the date hereof, to answer a bill of complaint exhibited against you in said court by Continental Candy Corporation, a corporation organized and existing under the laws of the state of New York which is a citizen of the state of New York and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 1st day of December, in the year of our Lord one thousand

nine hundred and twenty and of our Independence the 145th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's office of said court, pursuant to said bill; otherwise the said bill [21] may be taken *pro confesso*.

WALTER B. MALING,
Clerk.

B. J. A. Schaertzer,
Deputy Clerk.

MARSHAL'S RETURN.

I hereby certify that on the 1st day of December, 1920, at San Francisco, California, I served the within *subpoena ad respondendum* on California and Hawaiian Sugar Refining Co., a corporation, The First National Bank of San Francisco, California, a corporation and Canton Bank, a corporation, by handing to and leaving with Warren H. McBride, Secretary of the California & Hawaiian Sugar Refining Co., a true copy of the within writ, Wm. M. Cadogan, Vice Pres. of the

First National Bank of San Francisco, a true copy of the within writ, and E. F. Sagar, Gen. Mgr. of the Canton Bank, a true copy of the within writ, and at the same time handing to and leaving with each of the above named a certified copy of order to show cause and restraining order.

J. B. HOLOHAN,
U. S. Marshal.

By Frank J. Ralph,
Deputy.

[Endorsed]: Filed Jan. 21, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CO., a Corporation, THE FIRST NATIONAL BANK OF SAN FRANCISCO, CALIFORNIA, a Corporation, and CANTON BANK, a Corporation,

Defendants.

Motion to Dismiss Bill of Complaint.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order directing the dismissal of the bill of complaint herein, for the reasons and upon the grounds that it appears upon the face of said bill of complaint that:

1. The plaintiff is not entitled to the relief prayed for by its bill of complaint against this defendant, nor to any relief arising from the facts alleged in said bill of complaint.

2. Said bill of complaint is wholly without equity;

3. There is a nonjoinder of necessary parties [23] defendant herein, in this, that the First National Bank of Chicago, and Great Lakes Trust Company, the two Chicago banks which upon the procurement of the plaintiff have heretofore issued to this defendant the letters of credit mentioned in said bill of complaint, upon which the plaintiff seeks to enjoin this defendant from valuing, and against which it seeks to enjoin this defendant from drawing or presenting drafts, are neither of them joined as a party defendant.

4. The plaintiff acquiesced in the validity of each of the contracts of sale dated May 14, 1920, and May 18, 1920, respectively, and in the validity thereof, from the date of said respective contracts

until December 1, 1920, and made no claim of the invalidity of said contracts or either of them, despite the fact that during all of said time the market price of sugar of the quality and grade covered by each of said contracts was steadily falling, and that by reason thereof the plaintiff has disentitled itself to any relief in equity, and it would be contrary to equity and good conscience for the Court to take cognizance of said bill of complaint or to allow the plaintiff to maintain the same.

5. Plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of in said Bill of Complaint.

WHEREFORE, and for divers other good reasons of objections appearing upon the face of said bill of complaint, this defendant prays this Honorable Court for an order directing the dismissal of said bill of complaint, and allowing this defendant its reasonable costs in this behalf sustained.

Dated, December 27, 1920.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY.

Attorneys for the Defendant, California and Hawaiian Sugar Refining Co. [24]

Receipt of a copy of the within motion, this 27th day of December, 1920, is hereby admitted.

CHAS. LEROY BROWN,
IRA S. LILLICK,
JOHN S. PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING CO., a Corporation, THE FIRST
NATIONAL BANK OF SAN FRANCISCO,
CALIFORNIA, a Corporation, and CAN-
TON BANK, a Corporation,

Defendants.

**Answer of Defendant the First National Bank of
San Francisco.**

Comes now the First National Bank of San Francisco (hereinafter, for the purposes of convenience, called "defendant"), one of the defendants in the above-entitled suit, and answering the bill of complaint herein for itself alone and not for any of the other defendants says:

1. As to the allegations of paragraph 1 of said bill of complaint, and each and all thereof, defendant is without knowledge.

2. As to the allegations of paragraph 2 of said bill of complaint, and each and all thereof, defendant is without knowledge.

3. Defendant admits the allegations of paragraph 3 of said bill of complaint.

4. As to the allegations of paragraph 4 of said bill of complaint, and each and all thereof, defendant is without knowledge.

5. As to the allegations of paragraph 5 of said bill of [26] complaint, and each and all thereof, defendant is without knowledge.

6. As to the allegations of paragraph 6 of said bill of complaint, and each and all thereof, defendant is without knowledge.

7. As to the allegations of paragraph 7 of said bill of complaint, and each and all thereof, defendant is without knowledge.

8. As to the allegations of paragraph 8 of said bill of complaint, and each and all thereof, defendant is without knowledge.

9. Defendant admits that the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of the State of Illinois, issued a certain irrevocable letter of credit authorizing said defendant California & Hawaiian Sugar Refining Co. to draw on said First National Bank of Chicago up to a certain specified sum, to wit, Three Hundred Thousand Dollars (\$300,000). Defendant denies that said First National Bank of Chicago is not a necessary party to this suit, but on the contrary alleges that said bank last mentioned is a

necessary and indispensable party to said suit. Defendant has no knowledge concerning each and all of the remaining allegations of paragraph 9 of said bill of complaint, which are not in this paragraph specifically admitted or denied.

10. Defendant admits the allegations of paragraph 10 of said bill of complaint. In this behalf defendant alleges:

That heretofore, to wit, the 8th day of June, 1920, defendant received from the First National Bank of Chicago, a certain letter dated June 3, 1920, in words following:

“Messrs. First National Bank,
San Francisco, Calif.

Dear Sirs:

We enclose herewith copy of our commercial letter of credit CCA #6385, in favor of the California & Hawaiian Sugar Refining Co., San Francisco, for \$300,000.00.

We also enclose copy of our letter of credit CCA #6414 in favor of the California & Hawaiian Sugar Refining Co., San Francisco, for \$19,564.16.

Kindly advise the beneficiaries that the credits are confirmed and irrevocable and that you are prepared to pay drafts drawn thereunder when presented in accordance with the terms of the credits.

[27]

Please charge our account with such payments made, under advice to us, sending drafts to us with documents attached.

Thanking you for your attention, we beg to remain,

Yours very truly,

W. G. STRAND,

Assistant Manager."

That there was enclosed with said letter a copy of letter of credit C. C. A6385 issued by the First National Bank of Chicago, which said copy of letter of credit is in words following:

\$300,000.

"No. C. C. A 6385. Capital and Surplus \$22,000,000. \$300,000.00 (U. S. Currency).

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.

San Francisco, Calif.

Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago, at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of

1250 tons (2240 lbs. each)—99 test

25 Dutch Standard at \$19.85 per

100 lbs. F. O. B, San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers' and endorsed in blank.

The shipment must be completed and the Bill drawn on or before December 31, 1920, and ~~the ad-~~

vice thereof ~~(in duplicate)~~ sent to the First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice on receipt of which Documents the Bills will be duly honored.

The remaining Bills of Lading with ~~certified~~ invoices and Consular Certificates ~~must~~ be sent by the Bank or Banker ~~negotiating~~ drafts to _____ for account of the First National Bank of Chicago ~~and~~ a certificate to that effect must accompany draft.

We hereby agree with drawers, endorsers and *bona fide* holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of the First National Bank of Chicago.

This credit is confirmed and irrevocable.

INSURANCE. _____

Drafts under this Credit must bear upon their face the words:

DRAWN UNDER THE FIRST NATIONAL BANK OF CHICAGO.

CREDIT NO. C. C. A6385 dated June 2, 1920.

Respectfully yours,

C. P. CLIFFORD,

V. P."

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank, San Francisco., Calif.

[In Margin:] Countersigned: W. G. STRAND,
Ass. Mgr. [28]

That upon receipt of said letter from the First National Bank of Chicago and said copy of letter of credit last mentioned and on said 8th day of June, 1920, defendant addressed and mailed to de-

defendant California & Hawaiian Sugar Refining Co.
a letter which was thereafter in due course of mail
received by said California & Hawaiian Sugar Re-
fining Co., which said letter was and is in words
following:

“California & Hawaiian Sugar Refining Company,
San Francisco,
California.

Gentlemen:

We have received from the First National Bank,
Chicago, copies of their Letters of Credit, No. CCA-
6385 and CCA6414, for \$300,000.00 and \$19,564.16
respectively, both issued in your favor. These
credits are irrevocable and are hereby confirmed,
and we stand in readiness to pay your drafts drawn
under their provisions.

Very truly yours,

L. F. CADOGAN,
Assistant Cashier.”

Thereafter, to wit, the 20th day of August, 1920,
the terms of said letter of credit were changed by
said First National Bank of Chicago so as
to provide that shipments should be made
f. o. b. Crockett instead of f. o. b. San
Francisco as provided for in said original credit,
and at the request of said First National Bank of
Chicago defendant on the 24th day of August, 1920,
notified said California & Hawaiian Sugar Refining
Co. that said letter of credit had been amended to
read shipment f. o. b. Crockett instead of f. o. b.
cars San Francisco, and said California & Hawaiian
Sugar Refining Co. thereafter, to wit, the 25th day

of August, 1920, notified and advised defendant that said amendment was accepted by the California & Hawaiian Sugar Refining Co.; that said letter of credit, except as so modified, remains and is now in all other respects in full force and effect as the same was originally drawn as aforesaid. [29]

11. As to the allegations of paragraph 11 of said bill of complaint, and each and all thereof, defendant is without knowledge.

12. As to the allegations of paragraph 12 of said bill of complaint, and each and all thereof, defendant is without knowledge.

13. As to the allegations of paragraph 13 of said bill of complaint, and each and all thereof, defendant is without knowledge.

14. As to the allegations of paragraph 14 of said bill of complaint, and each and all thereof, defendant is without knowledge.

15. As to the allegations of paragraph 15 of said bill of complaint, and each and all of them, defendant is without knowledge.

16. As to the allegations of paragraph 16 of said bill of complaint, and each and all of them, defendant is without knowledge.

17. As to the allegations of paragraph 17 of said bill of complaint and each and all thereof, defendant is without knowledge.

18. As to the allegations of paragraph 18 of said bill of complaint, and each and all thereof, defendant is without knowledge.

19. As to the allegations of paragraph 19 of

said bill of complaint, and each and all of them, defendant is without knowledge.

20. Defendant admits that, upon presentation to it of drafts drawn under said letter of credit issued by said First National Bank of Chicago accompanied by the papers and documents required by said letter of credit and upon compliance with the other terms of said letter of credit, it is willing to pay in accordance with the terms and provisions of said letter of credit but not otherwise to said defendant California & Hawaiian Sugar Refining Co. the full amount of which such drafts not exceeding in all Three Hundred Thousand Dollars (\$300,000.00), but defendant alleges that it will not pay any such draft in view of the temporary injunction heretofore issued herein, nor will it do anything which it is enjoined from doing by said temporary injunction. Defendant is without knowledge in respect [30] of each and all of the remaining allegations of paragraph 20 of said bill of complaint, which are not in this paragraph specifically admitted.

21. Defendant admits that, by reason of the fact that plaintiff herein has established said irrevocable letter of credit issued by said First National Bank of Chicago, and by reason of the fact that said letter of credit is still in full force and effect is irrevocable, plaintiff is unable to stop payment by defendant of any draft drawn under and in accordance with said irrevocable letter of credit, unless defendant is enjoined and restrained from making payment of any such draft drawn

under said irrevocable letter of credit. Defendant is without knowledge in respect of each and all of the remaining allegations of paragraph 21 of said bill of complaint, which are not in this paragraph specifically admitted.

22. As to the allegations of paragraph 22 of said bill of complaint, and each and all thereof, defendant is without knowledge.

23. As to the allegations of paragraph 23 of said bill of complaint, and each and all thereof, defendant is without knowledge.

For a further and separate answer and defense defendant alleges that said irrevocable letter of credit issued by said First National Bank of Chicago is separate and distinct from any contract made or entered into by or between plaintiff and defendant California & Hawaiian Sugar Refining Co., and that said irrevocable letter of credit is the independent agreement of said bank issuing the same and defendant, and that defendant is in no [31] way concerned with, and has no knowledge of, any contract between plaintiff and said defendant California & Hawaiian Sugar Refining Co.

For a further and separate answer and defense defendant alleges that there is a nonjoinder of a necessary and indispensable party defendant in said suit in that the First National Bank of Chicago, by whom said letter of credit was issued, and at whose request defendant notified said California & Hawaiian Sugar Refining Co. that it would pay drafts drawn thereunder, is not joined as a party

defendant herein, and defendant prays the same effect and advantage of these facts and things and of the nonjoinder of said First National Bank of Chicago as if it had moved to dismiss the bill of complaint because of such facts.

WHEREFORE, having thus made a full answer to all the matters and things contained in the bill of complaint herein, defendant prays that it have judgment against plaintiff for its reasonable costs and charges in this behalf, and for such other and different relief as may be meet and equitable.

Dated: December 20, 1920.

CUSHING & CUSHING,
Attorneys for Defendant The First National Bank
of San Francisco.

Service of the within and receipt of a copy thereof on the 20th day of December, 1920, is hereby admitted.

IRA S. LILLICK,
LEROY BROWN,
JOHN PARTRIDGE,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

IN EQUITY.—No. 579.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING CO., a Corporation, THE FIRST
NATIONAL BANK OF SAN FRAN-
CISCO, CALIFORNIA, a Corporation, and
CANTON BANK, a Corporation,

Defendants.

**Answer of Defendant California and Hawaiian
Sugar Refining Company.**

Now comes California and Hawaiian Sugar Refining Company (hereinafter for purposes of convenience called the defendant), one of the defendants in the above-entitled suit, and answering the bill of complaint therein for itself alone and not for any of the other defendants, says:

1. As to the allegation in paragraph 1 of said bill of complaint, that the plaintiff was authorized by a license issued by the United States Sugar Equalization Board prior to May 14, 1920, and in force on and after May 18, 1920, to buy and sell sugar, defendant is without knowledge. Said defendant admits each of the other allegations of said paragraph 1 of said bill of complaint.

2. The defendant admits the allegations of paragraph 2 of said bill of complaint. [33]

3. The defendant admits the allegations of paragraph 3 of said bill of complaint.

4. The defendant admits the allegations of paragraph 4 of said bill of complaint.

5. The defendant admits the allegations of paragraph 5 of said bill of complaint except in so far as it is alleged therein that the above-entitled cause is within the jurisdiction of this honorable court. Defendant denies that said cause is within the jurisdiction of this honorable court for the reasons hereinafter stated.

6. The defendant admits that Exhibit "A" annexed to said bill of complaint is a true copy of the contract entered into between the defendant and the plaintiff under date of May 14, 1920. Defendant further admits that said contract was dated and was executed by the plaintiff in the City of Chicago, State of Illinois, and that the plaintiff there dealt with Seavey & Flarsheim Brokerage Co. representing the defendant. Defendant denies that the said brokerage company was an agent of the defendant, but admits and alleges that it was a mere broker to negotiate sales for the defendant and to submit to the defendant for its confirmation contracts of purchase procured by it from purchasers. Defendant admits that after said contract dated May 14, 1920, had been executed by plaintiff it was sent on by said brokerage company to the defendant at the City of San Francisco, State of California, and that it was there confirmed, signed and executed by

the defendant by its duly authorized officer and agent, and that thereupon the executed copy of said contract was delivered to the plaintiff. Defendant admits that said contract contained the provisions specified in paragraph 6 of said bill of complaint. Defendant denies that said contract contained as integral parts thereof or otherwise divers conditions and restrictions or any conditions or restrictions sought to be made binding upon the buyer but being for the benefit [34] of the seller except the conditions and provisions contained in the paragraphs numbered 1 to 4, inclusive, of said contract. Defendant denies that the provision in respect of arbitration contained in the paragraph numbered 5 of said contract was for the benefit of the seller alone, but, on the contrary, alleges that said provision was intended for the mutual benefit and advantage of both the buyer and seller under said contract. Defendant denies that the conditions and restrictions or any thereof contained in the paragraphs of said contract numbered 6 and 7 were for the benefit of the seller in said contract, or were included therein for any purpose except to comply with the requirements of the Attorney General of the United States of America acting through the Bureau of Investigation of the Department of Justice of the United States and the Fair Trade Commission, and in this behalf defendant alleges that the conditions and restrictions contained in said paragraphs numbered 6 and 7 of said contract were inserted in said contract and were imposed upon the buyer under said contract at the request and by the direction

of said Bureau of Investigation of the Department of Justice of the United States and said Fair Trade Commission acting in accordance with rules and regulations theretofore promulgated by the Attorney General of the United States under authority conferred upon him by law and enforce at the time of the execution of said contract, and defendant further alleges that said restrictions were and that each of them was imposed solely in the interest of the public and for the purpose of securing and procuring an equitable distribution of the sugar supply of the United States and of preventing speculation and profiteering therein by purchasers from sugar refining companies in the United States.

7. The defendant admits that Exhibit "B" annexed to said bill of complaint is a true copy of the contract entered into between the defendant and the plaintiff under date of May 18, 1920. [35] Defendant further admits that said contract was dated and was executed by the plaintiff in the City of Chicago, State of Illinois, and that the plaintiff there dealt with Seavey & Flarsheim Brokerage Co. representing the defendant. Defendant denies that the said brokerage company was an agent of the defendant, but admits and alleges that it was a mere broker to negotiate sales for the defendant and to submit to the defendant for its confirmation, contracts of purchase procured by it from purchasers. Defendant admits that after said contract dated May 18, 1920, had been executed by plaintiff it was sent on by said brokerage company to the defendant at the City of San Francisco, State of Cali-

fornia, and that it was there accepted in writing and signed by the defendant by its duly authorized officer agent, and that thereupon the executed copy of said contract was delivered to the plaintiff. Defendant admits that said contract contained the provisions specified in paragraph 7 of said bill of complaint. Defendant denies that said contract contained as integral parts thereof or otherwise divers conditions and restrictions or any condition or restriction sought to be made binding upon the buyer but being for the benefit of the seller except the conditions and provisions contained in the paragraphs numbered 1 to 4 inclusive, of said contract. Defendant denies that the provision in respect of arbitration contained in the paragraph numbered 5 of said contract was for the benefit of the seller alone, but on the contrary, alleges that said provision was intended for the mutual benefit and advantage of both the buyer and the seller under said contract. Defendant denies that the conditions and restrictions or any thereof contained in the paragraphs of said contract numbered 6 and 7 were for the benefit of the seller in said contract, or were included therein for any purpose except to comply with the requirements of the Attorney-General of the United States [36] of America acting through the Bureau of Investigation of the Department of Justice of the United States and the Fair Trade Commission, and in this behalf defendant alleges that the conditions and restrictions contained in said paragraphs numbered 6 and 7 of said contract were inserted in said contract and were im-

posed upon the buyer under said contract at the request and by the direction of said Bureau of Investigation of the Department of Justice of the United States and said Fair Trade Commission acting in accordance with rules and regulations theretofore promulgated by the Attorney General of the United States under authority conferred upon him by law and in force at the time of the execution of said contract, and defendant further alleges that said restrictions were and that each of them was imposed solely in the interest of the public and for the purpose of securing and procuring an equitable distribution of the sugar supply of the United States and of preventing speculation and profiteering therein by purchasers from sugar refining companies in the United States.

8. The defendant admits the allegations of paragraph 8 of said bill of complaint.

9. The defendant admits that prior to the amendment and modification of said contracts mentioned in paragraph 8 of the bill of complaint, plaintiff in pursuance of the terms of said contracts procured from the First National Bank of Chicago, a banking corporation organized under the laws of the United States, and a citizen and resident of Illinois, and from Great Lakes Trust Company, a banking corporation, organized under the laws of the State of Illinois and a citizen and resident of the State of Illinois, certain irrevocable letters of credit authorizing defendant herein to draw on the respective banks issuing such letters specified sums aggregating the purchase price of the sugar

fixed by the said two contracts mentioned in paragraphs 6 and 7 of the bill of complaint. In this behalf the defendant alleges that a true copy of [37] the letter of credit so issued by said First National Bank of Chicago is hereunto annexed marked Exhibit "A," and is hereby specifically referred to and made a part hereof, the same as if its terms and conditions were herein fully alleged and set forth at length. Defendant further alleges that a true copy of the letter of credit so issued by said Great Lakes Trust Company is hereunto annexed marked Exhibit "B," and is hereby specifically referred to and made a part hereof the same as if its terms and conditions were herein fully alleged and set forth at length. Defendant has no knowledge in respect to the allegations of said paragraph 9 to the effect that said banks issuing said irrevocable letters of credit did so without knowledge by them or either of them of all of the terms of said contracts of May 14, 1920, and of May 18, 1920. Defendant has no knowledge concerning the terms or any terms of the separate contracts of the plaintiff with said First National Bank of Chicago and said Great Lakes Trust Company, mentioned in paragraph 9 of the bill of complaint, and is therefore without knowledge of the liability of the plaintiff to repay to said last-mentioned banks, or either of them, any sums advanced by said banks, or either of them, under said letters of credit to the defendant, or under either of them. Defendant denies that said First National Bank of Chicago and Great Lakes Trust Company are not necessary parties to

this suit, but on the contrary alleges that each of said banks is a necessary and indispensable party to said suit.

10. The defendant admits the allegation of paragraph 10 of said bill of complaint.

11. The defendant admits the allegations of paragraph 11 of said bill of complaint.

12. The defendant admits that each of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint herein provided for transactions in trade or commerce among the several [38] states of the United States. The defendant denies, however, that each of said contracts, or that either of them, provided for transactions or any transaction in trade or commerce with a foreign nation. The defendant admits that each of said contracts relate to articles intended to be imported into the United States from a foreign country by the seller, but denies that the importation of said articles into the United States from such foreign country by the seller was dependent upon said contracts or either of them, or was to be made pursuant to said contracts or either of them. Defendant denies that each of said contracts, or that either of them, provided for the shipment of articles to the United States from Java, which is part of a foreign country, except in so far as each of said contracts provided for the sale of sugar which was in Java at the time that said contracts were respectively executed. Defendant denies that said articles were to be shipped to the United States pursuant to any provision of said contracts or of either of them, and

denies that the defendant intended to, or was required to or was to, import the said sugar so to be shipped from Java into the United States as principal of the plaintiff, or for the account of the plaintiff, except for its own account. In this behalf the defendant alleges that it had purchased in Java the sugar mentioned and referred to in each of said contracts prior to the execution of either of said contracts, and that neither the purchase nor the importation of said sugar from Java into the United States was at all referable to or dependent upon the sale by the defendant to the plaintiff of said sugar or to each or either of said two contracts of sale.

13. The defendant admits and alleges that in and by each of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint the plaintiff agreed that it would use the sugar covered by each of said contracts only for its own manufacturing purposes, and under no circumstances would resell said sugar, or [39] any part thereof, and that the plaintiff further agreed in and by each of said contracts that the sale of said sugar to the plaintiff should constitute the plaintiff's entire quota of sugar from the defendant from what was designated as the delivery date of said sugar under each of said contracts until the end of the year 1920. Defendant denies that said last-mentioned provisions and conditions or any thereof or that the whole or entire contract of sale between plaintiff and the defendant contained in each of said contracts of May 14, 1920, and May 18, 1920, or in

either of them, were or are or that any part of either of said contracts was or is, illegal, null or void, for the reason that the restriction therein against and the forbidding of the resale of said sugar, or any part thereof, by the plaintiff, and the forbidding of the sale by the defendant to the plaintiff of any more or other sugar in addition to the amounts and quantities specified in said two contracts of May 14, 1920, and May 18, 1920, prior to the end of the year 1920, were or are, or that either of said provisions or restrictions or any provision or restriction contained in either of said contracts was in unlawful or unreasonable restraint of trade either between the parties to said contracts themselves or in regard to the public at large. (Defendant denies that any of the provisions of said contracts or of either of them, was in any wise illegal, null or void, in any particular whatsoever.) Defendant further denies that said last-mentioned provisions of said contracts were or that either of them or any provision of said contracts was in violation of the anti-trust laws or any anti-trust law or any law of the United States forbidding contracts in restraint of trade among the several states or with foreign nations or forbidding restraint of lawful trade or free competition in lawful trade or commerce of any articles imported or intended to be imported into the United States and defendant denies that any provisions of said contracts were or that any thereof was in violation of any anti-trust law [40] of the United States or in restraint of trade or was in any particular or for

any reason illegal, null or void. In this behalf the defendant alleges that each of the restrictions and conditions contained in said contracts was reasonable and proper. Defendant denies that each of said contracts of sale or either of them or the terms and conditions of said contracts or either of them, or any term or condition of said contracts or either of them was in such unreasonable or unlawful or any restraint of trade as to be at variance with or contrary to public policy or interest or unreasonable or detrimental to plaintiff or to the interest or policy of the public at large, and denies that said contracts of sale or either of them or any term or condition of either thereof was in unreasonable or unlawful or any restraint of trade in any particular. Defendant denies that any restraint of trade embodied in or affected by said contracts of sale or either of them or by the terms or conditions of said contracts or either of them or by any term or condition of either of said contracts is in unqualified or any restriction of trade in a necessary commodity dealt with in trade or commerce among the several states and denies that said contracts are, or that either of them is, or that any term or condition of either of said contracts is, for that or for any other reason, illegal or fraudulent or that said contracts or either of them or any term or condition of said contracts or either of them, effect the withholding or removing of a necessary commodity from the public market or from the public use or restraint the freedom of trade for the benefit of the public or the public interest, or created a tendency

to the maintenance of high prices of or for such necessary commodity or a monopolistic inflation or raising of prices of or for the same. In this behalf defendant alleges that the provisions in the paragraphs numbered 6 and 7 of each of the aforesaid two contracts of sale dated respectively May 14, 1920, [41] and May 18, 1920, providing that the plaintiff should use the sugars covered by said respective contracts for its own manufacturing needs and under no circumstances should resell the same and that the amount of sugar covered by said contracts should constitute the plaintiff's quota of sugar from the defendant from the delivery date of said sugar until the end of the year, were inserted in each of said contracts at the request and by the direction of the Bureau of Investigation of the Department of Justice of the United States of America and of the Fair Trade Commission, and were so inserted for the purpose of providing an equitable distribution of the sugar stock of the United States so as to restrict each manufacturer requiring sugar in any product manufactured by it to have on hand no more sugar than was reasonably necessary for its business, thereby preventing the hoarding of sugar by manufacturers or the resale by them of the quantity of sugar in excess of their requirements at exorbitant or inflated prices and thereby preventing profiteering in sugar. In this behalf the defendant further alleges that at the respective dates of the aforesaid respective contracts all contracts for the sale of sugar made by sugar refining companies in the United States to

manufacturers in the United States were required by the Attorney General of the United States, through regulations promulgated by him under authority conferred upon him by law and by the Bureau of Investigation of the Department of Justice of the United States and by other agencies of the United States Government created to conserve food supplies and to control the distribution thereof to contain provisions similar in substance and effect to those contained in the paragraphs numbered 6 and 7 of the aforesaid two contracts of sale, and that the defendant inserted said provisions in said contracts under compulsion of law and not for its own benefit or protection, and that it had no option or election to withhold said [42] provisions or any of them from the said aforesaid two contracts of sale or from either of them. In this behalf the defendant further alleges that said provisions in said contract were inserted by it under compulsion of law and for a public and not a private purpose, and that the defendant has never had any purpose or desire to enforce either of said provisions in its own interest, but, on the contrary, at all times has been and now is willing to waive either or both of said provisions in so far as they or either of them at any time have been or now are capable of waiver by the defendant.

14. The defendant denies that each or either of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint is entirely or wholly or in any wise illegal or void because they or either of them contain provisions constituting integral parts

thereof and providing that all disputes and controversies under each of said contracts should be finally settled by prescribed arbitration, extra legal in character, and the defendant denies that the effect of said provisions or of any of them was or is to oust the courts of jurisdiction. Defendant denies that said provisions of said contracts were or are or that any of them was or is contrary or inimical to the public interest or welfare.

15. The defendant denies that at or before the time of entering into said contracts mentioned in paragraphs 6 and 7 of the bill of complaint or either of them the plaintiff protested the inclusion of the terms and conditions referred to in paragraphs 13 and 14 of said bill of complaint or any thereof and further denies that the plaintiff was informed by the alleged agent of the defendant mentioned in paragraph 15 of said bill of complaint that said alleged agent was the duly authorized agent to represent the defendant with respect to said contracts or either of them and the inclusion therein of said provisions [43] mentioned in paragraphs 13 and 14 of said bill of complaint. In this behalf defendant denies that said alleged agent mentioned in paragraph 15 of said bill of complaint was in fact the agent of the defendant or was duly or at all authorized to represent the defendant in respect of said contracts of sale or either of them, except as a broker to procure an order by the plaintiff for the purchase of the sugar mentioned in said contracts. Defendant admits, however, that it would not have entered into any contract of

sale with the plaintiff for sugar which did not contain the provisions set forth in the paragraphs numbered 6 and 7 of the aforesaid two contracts of sale, for the reason that it was forbidden by the Bureau of Investigation of the Department of Justice of the United States of America and by other agencies of the United States Government acting under and by the authority of the Attorney General of the United States and created for the purpose of conserving food supplies and of controlling the distribution thereof from entering into any contract of sale with the plaintiff which did not contain such provisions or provisions of similar substance or effect, because the plaintiff was a manufacturer of candy and other confectionery, using sugar in its manufactured product, and subject to the regulations theretofore promulgated by the Attorney General of the United States and by other governmental agencies hereinbefore mentioned, imposing upon manufacturers the restrictions imposed by paragraphs 6 and 7 of said contracts.

16. The defendant denies that each or either of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint was or is unilateral or without mutuality in that they or either of them gave the defendant the privilege of cancelling the contract if strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control prevented shipment or delayed delivery of the sugar covered by said contracts [44] or either of them, and further denies that each or either of

said contracts was therefore or for any other reason a *nudum pactum* or unenforceable.

17. Defendant denies that neither of said contracts mentioned in paragraphs 6 and 7 of the bill of complaint provided for any date of delivery of the sugar covered thereby to the buyer f. o. b. cars San Francisco or as each of said contracts was later modified and amended, f. o. b. cars at Crockett, California, or that while each of said contracts contained provisions as to the date when shipments were to be made from Java to the United States neither contained any provisions whatever for the time of delivery of said sugar from the possession and control of the defendant to the possession and control of the plaintiff, so that each of said contracts or either of them was or is in law terminable on reasonable or any notice from one party to the other prior to the delivery by the buyer to the seller of the sugar covered thereby. In this behalf the defendant alleges that in and by the provisions of each of said contracts, both as originally executed and as later modified delivery of the sugar covered thereby was to be made to the plaintiff within a reasonable time after the sugar covered by said contracts had been received by the defendant from Java. And the defendant further alleges that in and by the respective letters of credit issued to the defendant by the two Chicago banks hereinbefore named through the procurement of the plaintiff and for its account, it was provided that the delivery of sugar covered by each of said contracts should be made not later than December 31, 1920. Defend-

ant admits that plaintiff has given notice to the defendant of the termination and cancellation of said contracts dated May 14, 1920, and May 18, 1920, and of each of them, but defendant alleges that said attempted termination and cancellation of said contracts and of each of them by plaintiff is without any efficacy or validity and is null and void. [45]

18. Defendant denies that it has not complied with the provisions of said contract of May 14, 1920, requiring it to ship two hundred and fifty tons of sugar from Java during the month of September, 1920, and further denies that said provision of said contract was or is a material one. In this behalf the defendant admits and alleges that all of the sugar covered by said contract of May 14, 1920, was shipped from the point of shipment thereof at Sourabaya Java upon the 29th day of September, 1920, upon the Steamship "Bali" and that upon that date a bill of lading for said sugar was duly issued by the Java-China-Japan Steamship Line to which said steamship "Bali" belonged, and further that said steamship "Bali" left September 30, 1920, and thence proceeded to two other ports in Java and one in Borneo en route and that it arrived at San Francisco on November 23, 1920. Defendant admits that after said sugar was shipped from point of shipment thereof at Sourabaya, Java, on September 29, 1920, and the bill of lading therefor issued on that day by the steamship company to which the steamer on which said sugar was shipped belonged, said

steamer left the port of shipment at Sourabaya on September 30, 1920, thence proceeded to the port of Probolinggo, Java, which it left on October 4, 1920, thence proceeded to the port of Makasson, Celebes, which it left on October 9, 1920, thence proceeded to Batavia, Java, which it left on October 15, 1920, thence to the port of Balikpapan, Borneo, which it left on October 27, 1920, and that it thence proceeded directly to San Francisco at which port it arrived on November 23, 1920. In respect of the allegation that said steamship, after leaving the point of shipment of said sugar hereinbefore named, proceeded by its accustomed itinerary of voyage, the defendant is without knowledge. Defendant admits that because of the vessel carrying said sugar did not actually leave the Island of Java until well into the month of October, 1920, plaintiff has attempted [46] to rescind the entire contract of May 14, 1920, but defendant alleges that plaintiff's action in this respect is null and void, and that said attempted rescission of said contract is without effect.

19. Defendant admits that prior to the filing on the part of plaintiff herein of the bill of complaint, the plaintiff served upon the defendant at San Francisco, California, written notice advising and notifying defendant that the plaintiff had rescinded each of the contracts mentioned in the paragraphs 6 and 7 of the bill of complaint for alleged fraud and illegality and that the plaintiff treated and regarded each of said contracts as void and unenforceable and that it terminated each of

said contracts by reason of the alleged indefiniteness of the time of performance thereof by the defendant and by reason of no delivery having yet been attempted under either of said contracts and also notifying and advising the defendant that plaintiff had rescinded the entire contract of May 14, 1920, by reason of the alleged noncompliance by the defendant with the provision of said contract requiring two hundred and fifty tons of the sugar covered thereby to be shipped from Java during the month of September, 1920. In this behalf the defendant alleges that said notices were dated November 30, 1920, and were served upon the defendants on the very day upon which this suit was commenced, to wit, December 1, 1920, and defendant further alleges that no notice of similar substance, tenor or effect was served upon the defendant prior to December 1, 1920.

20. Defendant admits that sufficient sugar to include the quantity covered by the two contracts between the plaintiff and the defendant dated respectively May 14, 1920, and May 18, 1920, arrived in San Francisco by vessels arriving on November 23, 1920, and thereafter, and that the defendant notwithstanding the receipt of it of notices of attempted [47] cancellation of said contracts and of each of them served upon it by the plaintiff as set forth in paragraph 19 of the bill of complaint herein and notwithstanding the claim by the plaintiff of the illegality and voidness of said contracts and each of them, is about to tender and offer to the plaintiff all of the said sugar which has arrived

in San Francisco. Said defendant further admits that at the time of the filing of the bill of complaint herein it was about to present to the defendants, First National Bank of San Francisco and Canton Bank, the papers and documents required in and by the aforesaid irrevocable letters of credit issued by the aforesaid two Chicago banks to the defendant and was about to value on and under said letters of credit and thereby obtain payment in full of and for the 750 tons of sugar covered by said contract of May 14, 1920, and of and for the said 500 tons of sugar covered by said contract of May 18, 1920, but defendant alleges that in view of the temporary injunction heretofore issued herein it is not at the moment advised whether it shall attempt to value on or under said letters of credit by drawing on the aforesaid two San Francisco banks or either of them, or by drawing on the aforesaid two Chicago banks or either of them. The defendant, however, alleges that it is not about to obtain payment of said sugar from any of said banks so long as said temporary injunction shall continue in effect, or to do anything which it is enjoined from doing by said temporary injunction. In respect of the allegation of the bill of complaint that the defendants, The First National Bank of San Francisco, California, and Canton Bank, are upon presentation of drafts under said letters of credit accompanied by the required papers and documents, about to pay to this defendant the full purchase price of any and all or large parts of the sugar covered by said contracts of May 14, 1920,

and May 18, 1920, respectively, the defendant is without knowledge. [48]

21. Defendant admits that by reason of the provisions of said contracts requiring the plaintiff to establish the aforesaid irrevocable letters of credit, and by reason of the fact that such letters of credit have been established by the plaintiff and are still in full force and effect and are irrevocable the plaintiff is unable to stop payment of the purchase price of or for the sugar covered by said two contracts of sale under said irrevocable letters of credit by the defendant First National Bank of San Francisco, California, and Canton Bank, and defendant admits that plaintiff is unable to prevent the enforcement and carrying out by the defendant of said two contracts of sale, but defendant further denies that said contracts are or that either of them is illegal, null or void. Defendant admits that the plaintiff is unable to prevent the payment of the purchase price of the sugar covered by said contracts by said First National Bank of San Francisco and Canton Bank unless the defendant California and Hawaiian Sugar Refining Company is enjoined and restrained from receiving payment of the purchase price of said sugar under said irrevocable letters of credit and each of them, and unless the defendants First National Bank of San Francisco and the Canton Bank are enjoined and restrained from making payment of said purchase price of said sugar under said irrevocable letters of credit.

22. Defendant denies that unless an injunction be granted, plaintiff will sustain or suffer irreparable injury by being compelled if drafts are drawn under said letters of credit and are honored and paid, to at once pay to the First National Bank of Chicago and Great Lakes Trust Company the amount of said drafts which may aggregate \$555,800 or because in the event of said drafts being drawn by the defendant and valued by said banks and the amount paid therefore by said banks is paid to said banks by the plaintiff, the latter will have [49] received nothing under said contracts. In this connection the defendants denies that under the circumstances mentioned the plaintiff will have received nothing under said contracts, but on the contrary, alleges that under said circumstances the plaintiff will have received all of the sugar covered by said two contracts dated May 14, 1920, and May 18, 1920, respectively, and for which it agreed in and by said contracts to pay the amount of said drafts. Defendant further denies that unless an injunction be granted plaintiff will sustain or suffer irreparable injury because it would be necessary for plaintiff to proceed to the State of California of which it is a nonresident in order to sue the defendant at law for damages to the great or any annoyance or expense of plaintiff or because the loss of the use of the sums of money covered by said letters of credit would seriously or at all jeopardize the plaintiff's financial strength during the pendency of an action to recover damages, or because in such action to re-

cover damages, defendant could or might contend that in so far as plaintiff's right of action depended on claims by it that said contracts of May 14, 1920, and May 18, 1920, or either of them was illegal or contrary to public policy, such action for recovery of damages could not be maintained by plaintiff for the reason that on the part of the defendant the contract was executed or because a court of law would not lend its aid to recover back money paid under a contract illegal or contrary to public policy, or because the defendant might or would contend that in so far as such right of action of the plaintiff for damages depended on claims by it that each of said contracts or either of them was *nudum pactum* or terminable by plaintiff on reasonable notice the procuring of issuance of letters of credit by which payments were effected, was the result of a mistake of law by plaintiff which would preclude recovery of damages sustained by it as a result of payments of [50] the purchase price fixed by said two contracts of May 14, 1920, and May 18, 1920, or either of them. In this behalf defendant denies that either of said contracts dated May 14, 1920, and May 18, 1920, respectively, is or was illegal or contrary to public policy or was a *nudum pactum* or terminable by plaintiff on reasonable or any notice. Defendant further denies that unless the injunction prayed for herein be granted plaintiff may be subjected to great or any loss or damages or be without any redress or relief whatever on

account thereof, and further denies that plaintiff is without recourse save in a court of equity.

23. Defendant denies that if notice of application for a temporary restraining order had been given to the defendants or particularly to this defendant plaintiff would have suffered immediate or irrevocable or any loss or damage before the matter could be heard by this Honorable Court on notice because of the or any of the matters or things alleged in paragraph 23 of the bill of complaint, or for any other reason

For further and separate answer and defense, defendant alleges that said two contracts are, and that each of them is, separate and distinct from each of the irrevocable letters of credit in said bill of complaint referred to; that said contracts are, and each of them is, a contract of sale between plaintiff and defendant; that of said irrevocable letters of credit,—of which there are two,—each is a contract made by the bank issuing it with this defendant and the holders of drafts to be drawn in reliance on said letter of credit, the terms of said respective letters of credit providing for the payment of drafts drawn in accordance with their provisions; and such irrevocable letters of credit are entirely distinct, and each of them is entirely distinct, from said contracts, [51] or either of them, except in the matter of the quality, character, kind and test of the sugar involved in the contracts of sale, and there is no dispute made by plaintiff in its bill of complaint, or at all, or any contention, as to any defect in

the quality, test, grade, standard or character of such sugar involved, and these points are not in issue herein; and that as to all other terms the said contracts and the said irrevocable letters of credit are absolutely dissimilar and have nothing in common, and, where they have points in common, it is admitted by plaintiff that there can be no dispute.

And this defendant further alleges in this regard that it has the right to demand and here requires the performance of the obligations of said letters of credit as by the contracts of said letters of credit provided and without regard to any alleged nonperformance of said contracts of sale or either of them by said defendant and without regard to any question of construction of the legality of said contracts of sale or either or them.

For further and separate answer and defense defendant alleges and shows that on the 14th day of May, 1920, and on the 18th day of May, 1920, and for a long time before and after said dates last named, this defendant was acting under license to do business as a refiner of sugar duly issued by the authority of the United States Food Administration, and not withdrawn, but still in force at the date of said contracts after the powers and duties of the Food Administrator, Mr. Herbert Hoover, were transferred by proclamation of the President to the Attorney General of the United States; that the Act of Congress under which the powers of the President in the conditions of emergency and stress consequent upon the Great

War in Europe and the right to issue said license were derived, is entitled, "An Act to provide further for the National Security and Defense by encouraging the [52] production, conserving and supply, and controlling the distribution of food products and fuel"; that this act was approved on the 10th day of August, 1917, and is hereby referred to in every particular and for every purpose precisely as if it had been inserted in all its terms herein.

That on the same day of the adoption of the said act, to wit, the 10th day of August, 1917, the President of the United States, by executive order or proclamation duly made and given, created and provided for the United States Food Administration, and appointed Herbert Hoover United States Food Administrator; that the powers given to said Food Administrator and to the said United States Food Administration are clearly set forth and referred to in said executive order or proclamation, and that sugar was one of the foods included in and provided for in said executive order or proclamation; that on the 7th day of September, 1917, the President duly issued his proclamation declaring that all persons, firms, corporations and associations engaged in the business either of importing sugar, or of manufacturing sugar from sugar-cane or beets, or of refining sugar, and others, were required to secure on or before October 1st, 1917, a license to do business under such rules and regulations as might be prescribed; and provided further that application for such license should be made

to said United States Food Administrator at Washington, D. C., upon forms prepared by him for such purpose; that as soon thereafter as possible this defendant duly applied for and obtained such a license and was acting under the same at the date of each of the said contracts of sale; that one of the conditions of obtaining said license was, that in the event of the breach of any of the rules of the Food Administration applying to its business such license could be revoked, and during such period of revocation this defendant would not be allowed to do business as a refinery; that amongst the rules and regulations [53] of said Food Administration was what is known as "Rule 6," governing refiners like this defendant, which was fully known to and understood by this defendant at all times herein mentioned and which is as follows:

"Rule 6. REALES WITHIN SAME TRADE PROHIBITED, WHEN—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade, without unreasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice."

That this Rule 6 was in full force and effect and was known to, and respected by, this defendant in making and executing said two contracts with plaintiff.

That this defendant was required by its understanding of said Rule 6 to prevent the breach of said Rule by any of its customers to whom it sold sugar, and to that end and in accordance with the requirements of the Department of Justice, as hereinafter set forth, inserted a proviso in its contracts with said plaintiff requiring the observance of said Rule, and this defendant realizes and believes and was so advised that as a matter of law the right of the United States Food Administration to require and force the issuance of said license gave to said Food Administration the right to dictate clauses in all contracts made by this defendant for the sale of the sugar, such clauses to be so dictated in the interests of observing the requirements of the Food Administration and the purposes of said Act of Congress and proclamations or executive orders of the President; that on the 23d day of August, 1917, the Attorney General of the United States, considering generally the authority of the United States Food Administrator under such Act of Congress to enter into agreements with persons in various trades and industries which if made between private traders would violate the Sherman Anti-Trust Act adopted by Congress on the 2d day of July, 1890, announced as [54] his opinion that such agreements made through the Food Administrator acting by direction of the President under authority of section 2 of said Act of Congress first hereinabove referred to and having reasonable relation to the objects enumerated in section 1

of said act, that is to say, to assure an adequate supply of equitable distribution of necessities and to maintain and establish governmental control of necessities during the War, would not fall within the operation of the Sherman Anti-Trust law even though the effect of such agreement might be to affix a uniform price or to establish a pooling of output, this letter concluding with these words: "For, when natural laws of trade can no longer be depended upon to regulate markets, the only choice is between artificial control imposed by private interests and artificial control imposed by public agencies. In these circumstances, therefore, such governmental action, so far from running counter to the purpose of the Sherman law, is directly in line with it." This letter of the Attorney General is referred to in "Opinions of Attorney General," Vol. 31, page 376, and this defendant further alleges that said opinion of the Attorney General was fully known to and understood by this defendant on the dates of said two contracts, and is hereby referred to for every purpose herein.

That on the 21st day of November, 1919, the President provided by proclamation that the powers theretofore vested in the United States Food Administrator under the authority of said Act of Congress first herein referred to and by executive orders or proclamations issued thereunder in so far as they might apply to foods, other than wheat and wheat products, should thereafter be exercised by the Attorney General of the United States, to whom was given power by said proclamation last

referred to to supervise, direct and carry into effect the provisions of said Act of Congress first herein referred to, together with all [55] the powers, rights and duties theretofore vested in said Food Administrator, including the right to issue, regulate and revoke, in the name of the Attorney General of the United States, licenses such as the one hereinbefore referred to as having been issued by the Food Administrator to this defendant, and that said proclamation last named further provided as follows:

“All licenses and revocations of licenses and all regulations now in force, so far as the same apply to foods, feeds and their derivative products other than wheat and wheat products, shall continue in force until altered or repealed by the Attorney General,”

and that prior to the date last-named there had been issued to this defendant by the United States Food Administration, through Herbert Hoover, United States Food Administrator, a License, dated October 3, 1917, to import, refine and manufacture sugar, and that this license was in force on the date last named, and has never been revoked; and, furthermore, this defendant asserts that said Rule 6, hereinbefore referred to, was a Rule or Regulation of said United States Food Administration by the proclamation last referred to and was automatically continued in force and remained in force as a matter of fact until long after the dates of said two contracts subject of this action.

That furthermore, pursuant to said powers so transferred from said United States Food Administrator to the Attorney General of the United States by said proclamation last referred to, Howard Figg, Special Assistant to the Attorney General and acting for him, addressed a letter to the American Sugar Refining Company at New York City, under date of April 29th, 1920, with special reference to Rule 6 and its continuance in force, in words and language as follows:

“DEPARTMENT OF JUSTICE.

WASHINGTON, D. C.

April 29, 1920.

The American Sugar Refining Company,

New York City. [56]

Gentlemen:

It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices. The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

I shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which pro-

hibit resales within the trade. I herewith quote for your information, as well as for that of your trade, this rule:

‘Resales within same trade prohibited, when
—The licensee, in selling food commodities, shall keep such commodities moving to the customer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.’

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers.

Yours very truly,

(Signed) HOWARD FIGG,

Special Assistant to the Attorney General.”

And this defendant further alleges that although said letter last cited was addressed to the American Sugar Refining Company, by its terms it nevertheless applied to all refiners of sugar in the United States, and was general in its language, and it served to reiterate and emphasize, as an example of the attitude of the office of the Attorney General of the United States on the subject of resales, Rule 6 of the original rules and regulations of the United States Food Administration; and it will be borne in mind that this letter last referred to was dated fifteen days before the date of the first of said contracts between this defendant and plaintiff hereinbefore referred to, and this defendant

further alleges that its action in inserting said clauses 6 and 7 in said contracts was in direct performance of the intention and purpose of the Department of Justice of the United States through its Attorney General acting under the [57] powers and duties of said proclamation of the President dated November 21, 1919, hereinbefore referred to.

That on and before the said 14th day of May, 1920, and on and before the 18th day of May, 1920, there was in existence in the City and County of San Francisco, State of California, an agency of the Department of Justice organized and instituted by the Attorney General of the United States, known as the Bureau of Investigation, whose purposes were to investigate food prices and transactions in the sale of food and food supplies including sugar, and that this defendant was constantly and often visited by the agent of said Bureau of Investigation at San Francisco with reference to its transactions in sugar; that also on said dates of said contracts there was in existence in San Francisco an organization known as the Fair Trade Commission composed of residents of the City and County of San Francisco and vicinity, and whose chairman was H. Clay Miller; that said H. Clay Miller was designated by the Attorney General of the United States, under the general powers and authority granted him as aforesaid by the President, as such chairman, and was requested by him to name and designate and form his own organization by selecting and appointing the other members of said Fair Trade Commission, in pur-

suance of which he did so select and appoint the following persons to act with him, to wit: Milton H. Esberg, John A. Britton, John R. Hanify, R. B. Hale, E. S. Heller, Mrs. Aaron Schloss and Mrs. Helen M. Knight.

And this defendant further alleges that prior to entering into said two contracts with plaintiff it was in constant communication with said Bureau of Investigation and with said Fair Trade Commission in reference to the price at which it would be allowed to sell Java White Sugars imported by it from Java, and especially such sugars as it was at that time about to sell to said plaintiff, and that all its acts in connection with its said [58] contracts with said plaintiff were understood and advised upon by said Bureau of Investigation, and said Fair Trade Commission, and that it was at the request and by the direction of said Bureau of Investigation, approved by said H. Clay Miller as Chairman of said Fair Trade Commission, that said two clauses, six and seven, were inserted in said contracts, and the same were required by the said Department of Justice; that in all matters leading up to the execution of said two contracts this defendant was acting under the advice and consent of and by the direction of and in full confidence towards said Department of Justice and the powers given, as hereinbefore set forth, to the Attorney General of the United States in the premises, and that this defendant well knew that because the Attorney General of the United States had the power to revoke its said license to do

business, said Attorney General of the United States, or his agencies or agents, had also the power, as hereinbefore stated, to dictate the terms and requirements of any contract that it might make for the sale of its sugar, and that at all times herein referred to this defendant believed it was acting in strict regard to its duties as a citizen in observing the requirements of the Government through the Attorney General of the United States succeeding the United States Food Administrator, as above set forth, and that the insertion of said clauses was not a voluntary act of this defendant, but the directed act of the Department of Justice cheerfully concurred in by this defendant as an obedient citizen.

That, in view of the contents of the aforesaid letter dated August 23, 1917, of the Attorney General of the United States, an extract from which is hereinabove given, declaring the nonviolation of the Sherman Anti-Trust Act by contracts made between producers and traders of the United States and the Food Administrator, fixing food prices in the United States, and in view of the powers transferred to and exercised by the Attorney General [59] of the United States, as hereinabove set forth, and in view of the said letter of Howard Figg, representing said Attorney General of the United States, to the American Sugar Refining Company, dated April 29th, 1920, set forth hereinabove in full, this defendant, in entering into said contracts, did not deem it was in any wise violating any law or any Act of Congress of the United

States, especially the Sherman Anti-Trust Act, and contends now that there was no violation of said Sherman Anti-Trust Act by anything that it has done or that has been done in connection with said contracts or either of them.

For a further and separate answer and defense defendant also alleges and shows this Court that the President of the United States by proclamation dated the 13th day of October, 1920, and effective the 15th day of November, 1920, pronounced and declared that licenses with respect to sugar to the refiners and others were no longer essential and that license regulations under said licenses or proceeding therefrom were cancelled by said proclamation and declared of no effect and void; and this defendant contends that automatically the said clauses 6 and 7 of said contracts became on the date last mentioned of no effect and void; that the action herein was begun on the 1st day of December, 1920, complaining of the illegality of said contracts by reason of the insertion of said two clauses, when at that very time said clauses were of no effect and void by reason of the Presidential Proclamation last referred to, and this defendant respectfully refers to said proclamation for every purpose in connection herein.

That as this defendant is informed and believes and therefore alleges, said defendant on the above dates of said contracts, was also under license similar to that of this defendant, and issued by similar authority, and could at any time [60] have petitioned to the Attorney General of

the United States or to competent authority in Washington for permission to make resales that were prohibited by said clause 6 of said contracts, and said plaintiff could have rested its case in this regard with the Attorney General of the United States, who would presumably have issued permission to make a resale at any time had it been consistent with his duties and powers so to do, and that in so far as this defendant is informed and believes, and therefore alleges, no application for the right so to resell was ever made by said plaintiff to anyone.

For a further and separate answer and defense, the defendant alleges that there is a nonjoinder of necessary and indispensable parties defendant in said suit in that the First National Bank of Chicago and the Great Lakes Trust Company, the two Chicago Banks which the plaintiff, as required by its two contracts with the defendant dated May 14, 1920, and May 18, 1920, respectively, procured to issue to the defendant the letters of credit upon which the plaintiff seeks to enjoin the defendant from valuing and against which it seeks to prevent the defendant from drawing or presenting drafts are neither of them joined as a party defendant herein and the defendant prays the same effect and advantage of these facts and things and of the nonjoinder of said First National Bank of Chicago and said Great Lakes Trust Company, as if it had moved to dismiss the bill of complaint because of such facts.

For a further and separate answer and defense, the defendant alleges that it appears upon the face of the bill of complaint by plaintiff's showing that it is not entitled to the relief prayed for against the defendant or to any relief arising from the facts alleged in said bill of complaint, and the defendant [61] prays the same benefit and advantage of these facts and things as if it had moved to dismiss the bill of complaint because of such facts.

For a further and separate answer and defense, the defendant alleges that it appears from the face of said bill of complaint that the same is wholly without equity and the defendant prays the same benefit and advantage of this fact as if it had moved to dismiss the bill of complaint because of it.

For a further and separate answer and defense, the defendant alleges that it appears upon the face of said bill of complaint that plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of by it in said bill of complaint and the defendant prays that it may have the same benefit and advantage of this fact as if it had moved to dismiss the same bill of complaint because of it.

For a further and separate answer and defense the defendant alleges that on May 14, 1920, the date of the first of the two contracts mentioned in the bill of complaint, the market price of sugar of the quality and grade covered by said contract was \$.21 $\frac{3}{4}$ per pound, which was almost two cents

per pound higher than the price specified in said contract, to wit: \$.1985 per pound; that on May 18, 1920, the date of the second said contracts of sale, the market price of sugar of the quality and grade covered by said second contract was \$.23½ per pound, which was more than three and one-half cents per pound higher than the price specified in said contract, to wit: \$.1985 per pound. Defendant further alleges that since the execution of the latter of said two contracts the market price of sugar has steadily fallen, so that on November 30, 1920, and on December 1, [62] 1920, said market price of sugar of said quality and grade was only eight cents per pound, and on December 17, 1920, was only seven and one-half cents per pound. Defendant further alleges that the plaintiff did not notify the defendant of any claim by it that said contracts were, or that either of them was, null or void, or illegal, or incapable of rescission or cancellation by the plaintiff by reason of any of the matters or things alleged in the bill of complaint herein, or for any reason whatsoever, until it did so by notice dated November 30, 1920, and served upon the defendant the very day upon which this suit was commenced, to wit: December 1st, 1920. On the contrary, defendant alleges that at all times after the execution of said respective contracts and up to December 1, 1920, the plaintiff affirmed and ratified said contracts in all respects, and that as late as September 2, 1920, the plaintiff requested the defendant to postpone until November 1920, shipment from Java of such of the sugar covered

by said contracts as it was therein provided should be shipped from Java in September 1920, and to postpone until December, 1920, the shipment from Java of such of the sugar covered by said contracts as it was therein provided should be shipped from Java in October, 1920.

- Defendant further alleges that if said plaintiff had informed the defendant directly after the execution of said two contracts respectively or within a reasonable time thereafter of its claim that said contracts were or that either of them was illegal or void or terminable or capable of rescission by plaintiff on account of any of the matters or things alleged in the bill of complaint herein, the defendant, if it had acquiesced in said claim, and cancelled said contracts and released the plaintiff from the obligation thereof, might have resold the sugar covered by said two contracts without suffering any great loss or damage, but defendant alleges that the plaintiff willfully and intentionally [63] failed to make any claim to the defendant of the invalidity of said contracts or of either of them, or of the plaintiff's right to cancel or rescind said contracts, or either of them, by reason of any of the matters or things alleged in its bill of complaint until delivery under said two contracts was about to be made, at which time the market price of sugar was so low that a cancellation or rescission of said contracts by the plaintiff at that time and a sale of the sugar covered thereby by the defendant would involve a loss to the defendant of more than \$300,000.00.

The defendant further alleges that the failure of the plaintiff to make any claim of the invalidity of said contracts of sale, or of either of them, or of its right to rescind said contracts or either of them was due to the fact that plaintiff did not wish to cancel or rescind either of said contracts so long as there was any possibility of the market price of sugar rising to the price fixed in and by said contracts of sale, so that plaintiff might have the benefit of said contracts in the event that the price fixed therein was below the market price of sugar of like quality and grade at the time of delivery of said sugar; and the defendant further alleges that the only reason that the plaintiff now claims that said contracts are, or that either of them is, invalid or seeks to rescind or cancel said contracts, or either of them, is that the market price of sugar of the quality and grade specified in each of said contracts is now more than twelve cents per pound below the price fixed in each of said contracts; and defendant further alleges that if the market price of sugar of the quality and grade specified in said contract was now equal to or greater than the price fixed in said contracts, the plaintiff would not be claiming that either of said contracts was or is illegal or null or void for any reason whatsoever, and would not be claiming the right to rescind the said contracts or either of them. [64]

Defendant further alleges that the plaintiff, by reason of its acquiescence in the said contracts and in their validity at all times after the execu-

tion of said contracts until December 1, 1920, and by reason of its failure to promptly claim a right to rescind or cancel said contracts so as to permit the defendant to sell the sugar covered by said two contracts without great loss or damage to said defendant in the event that it agreed to a rescission or cancellation of said contracts, has disentitled itself to equitable relief, and is estopped to claim or contend that said contracts are, or that either of them is, illegal or void or terminable or capable of rescission by the plaintiff by reason of any matter or thing alleged in the bill of complaint, or for any other reason.

For a further answer, and by way of counter-claim, this defendant alleges that in and by the order of temporary injunction made by this Honorable Court on December 8, 1920, it was and is provided that First National Bank of San Francisco and Canton Bank, defendants herein, and the First National Bank of Chicago, and Great Lakes Trust Company, might pay to Walter B. Maling, Special Master appointed by said order of temporary injunction as depository for that purpose, the amount of any and all drafts which might be presented by the defendant to either of the four above-named banks under and pursuant to the two letters of credit mentioned in said order of temporary injunction and heretofore issued to the defendant by said First National Bank of Chicago and Great Lakes Trust Company; and defendant further alleges that on December 17, 1920, it presented to the First National Bank of San Francisco a draft

drawn on First National Bank of Chicago under and pursuant to the aforesaid letter of credit issued to said defendant by said last-named bank, which said draft was by its terms payable to the order of defendant and was for the amount of [65] \$111,160.00, and that said draft so drawn and presented was accompanied by a bill of lading in respect of 250 tons of the sugar covered by the aforesaid contracts between the plaintiff and the defendant, and by the other documents in due form required by the terms of said letter of credit; and the defendant further alleges that it is its intention to draw and present under and pursuant to the aforesaid letters of credit and each of them drafts for the balance of the purchase price of all sugar covered by said two contracts of sale as fast as the balance of said sugar covered by said contracts can be loaded on railroad cars and bills of lading therefor are duly and property issued.

WHEREFORE, having thus made a full answer to all of the matters and things contained in the bill of complaint herein, said defendant prays that the plaintiff herein be denied any relief by this Honorable Court, and that its bill of complaint be dismissed, and further, that by the final decree herein it be adjudged and determined that the defendant is the owner of all moneys which during the pendency of this suit may be paid to the aforementioned Special Master by any of the four banks above named, on account of any and all drafts drawn and presented and to be drawn and presented against said banks or any of them, under

and pursuant to the aforementioned letters of credit issued by said two Chicago banks, to the defendant, and that said Special Master be by said decree ordered and directed to pay to the defendant all such moneys received by him; further, that the defendant have judgment against the plaintiff for its reasonable costs and charges in this behalf most wrongfully sustained; and for such other and different relief as may be meet and just and in accordance with equity.

Dated: December 17, 1920.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian
Sugar Refining Company. [66]

Exhibit "A."

ORIGINAL.

\$300,000

Capital and Surplus, \$22,000,000.00

No. G. C. A6385—

\$300,000.00 (U. S. Currency)—

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Calif.

Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois,

for cost of 1250 tons (2240 lbs. each) 99 test 25 Dutch Standard @ \$19.85 per 100 lbs. F. O. B. San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers' and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and the advice thereof (in duplicate) sent to The First National Bank of Chicago accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored.

~~The remaining Bills of Lading with certified invoices and Consular Certificates must be sent by the Bank or Banker negotiating drafts to _____ for account of the First National Bank of Chicago and a certificate to that effect must accompany draft.~~

We hereby agree with drawers endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago.

This credit is confirmed and irrevocable.

Insurance _____

Drafts under this Credit must bear upon their face the words:

Drawn under The First National Bank of Chicago.

Credit No. G. C. A6385, dated June 2, 1920.

Respectfully Yours,
C. P. CLIFFORD, V.-P.

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank, San Francisco, Calif.

[In margin:] Countersigned:

W. G. STRAND, A. Mgr.

[Stamped across face:] ORIGINAL. [67]

Exhibit "B."

GREAT LAKES TRUST COMPANY,

Harry H. Merrick, President
James C. Johnson, Vice President
John W. Thomas, Vice President
Raymond R. Phelps, Vice President
Charles C. Willson, Vice President
William A. Nicol, Cashier
Everett L. Augustus,
Assistant Cashier
Roy J. Birkle,
Assistant Cashier

William F. Roberts,
Mgr. Bond & Investment Dept.
Nathan G. Chatterton,
Mgr. Foreign Dept.
Tillie S. Frankenthal,
Mgr. Special Service Dept.
Vallee O. Appel,
Mgr. Trust Dept.
Alan S. Wallace,
Secy. & Mgr. New Business Dept.
Ralph E. Zuck,
Mgr. Savings Dept.

Capital Stock, \$3,000,000

Surplus, \$600,000

110 So. Dearborn Street,
Chicago, Ill.

June 1, 1920.

California & Hawaiian Sugar Refining Co.,
San Francisco,
California.

OUR COM'L CREDIT No. 1073.

Gentlemen:

For account of the Continental Candy Corporation of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding \$255,800.00 (two hundred fifty five thousand eight hundred dollars) to cover Dutch standard 25

refined sugar 99% test, to be shipped from Java during September and/or October, 1920.

Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be \$19.85 per 100 lbs. F. O. B. San Francisco.

This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date.

We hereby agree with the makers, endorsers and bona fide holders of all drafts under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank.

Yours very truly,
JOHN W. THOMAS,
Vice-President.

N. G. CHATTERTON,
Manager, Foreign Department.

P. S.—Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco.

N. G. C.
Mgr. [68].

Receipt of a copy of the within answer this 17th day of December, 1920, is hereby admitted.

IRA S. LILLICK,

CHAS. LEROY BROWN,

JOHN S. PARTRIDGE,

Attorneys for Plaintiff.

CUSHING & CUSHING,

Attorneys for Defendant The First National Bank
of San Francisco.

H. U. BRANDENSTEIN,

Attorney for Defendant, Canton Bank.

[Endorsed]: Filed Dec. 17, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Oath of Office of Special Master.

I, Walter B. Maling, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of Special Master in the above-entitled suit. SO HELP ME GOD.

WALTER B. MALING.

Subscribed and sworn to before me this 22d day of December, 1920.

[Seal]

J. A. SCHAERTZER,

Deputy Clerk U. S. District Court, Northern Dis-
trict of California.

[Endorsed]: Filed Dec. 22, 1920. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[70]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division.

579—EQUITY.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA & HAWAIIAN SUGAR REFIN-
ING CO., a Corporation, THE FIRST NA-
TIONAL BANK OF SAN FRANCISCO,
California, a Corporation, and CANTON
BANK, a Corporation,

Defendants.

(Opinion.)

On May 14, 1920, plaintiff Candy Company en-
tered into a contract with defendant Sugar Com-
pany for the purchase of 750 long tons of white
Java sugar. The contract contained the following
provisions:

“1. The California & Hawaiian Sugar Refining
Co., of San Francisco, have today sold, and the
Continental Candy Corporation of Chicago, Illinois,
have today bought the following sugars:

“750 tons, each, 2,240 lbs. 10% more or less,
White Java sugar at 19.85, net cash, duty paid,

landed weights, F. O. B. cars San Francisco, California; 25 Dutch Standard—99 Polarization.

“250 tons, 10% more or less, shipment from Java September, 1920.

“500 tons, 10% more or less, shipment from Java October, 1920.

“2. PAYMENT. Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. in the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

“3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

“4. Any change of import duty understood to be for account of buyer.

“5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

“6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

“7. Sales of this sugar to manufacturers constitutes their quota [71] of sugar from the California & Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.”

Four days later, a similar contract between the same parties for the purchase and sale of five hundred additional tons of sugar was entered into.

At the time of these purchases the price of sugar in the market had been rising for some time and was then in the neighborhood of 22¢ per pound. It continued to rise until about the middle of July when a steady decline ensued. By the latter part of October, it had reached 11¢ per pound and on the day the bill of complaint was filed herein, December 1, 1920, it had fallen to 8¢ per pound. By December 17, the day answer was filed, it had fallen to 7½¢ per pound.

Pursuant to the provisions of paragraphs 2 of the contracts, irrevocable letters of credit, expiring December 31, 1920, were established by the Candy Company—\$300,000 with defendant First National Bank, and \$255,800 with defendant Canton Bank.

On December 1, plaintiff filed its bill of complaint alleging the making of the contracts referred to and the establishment of irrevocable letters of credit and that plaintiff would in due course be bound to repay any sums advanced in payment of sugar delivered pursuant to the terms of the irrevocable letters of credit. Plaintiff further alleged that both of the entire agreements between plaintiff and defendant were illegal, null and void,

because the clauses forbidding the resale of the sugar and establishing plaintiffs quota were in unlawful and unreasonable restraint of trade and in violation of the anti-trust laws.

It was further alleged that plaintiff, for the reasons given, had rescinded the contracts and duly notified the Sugar Company thereof. Alleging the arrival and probable immediate delivery of said sugar, with consequent demand on, and payment by, defendant banks of the sums represented by the irrevocable letters of credit, to plaintiff's irreparable damage in the premises, the prayer was for a restraining order enjoining the tender or delivery of the sugar, [72] the negotiation or payment of either of the irrevocable letters of credit, and for a decree declaring the contracts "illegal, null and void, cancelled, and rescinded" and for a permanent injunction, etc., etc.

A temporary restraining order was issued, and by agreement the matter came on for final hearing on the merits on December 27. The substantial issues tendered by defendants were to the effect that the clauses in the contracts numbered 6 and 7, specifically objected to by plaintiff, did not suffice in any respect to operate in unreasonable or unlawful restraint of trade or to violate the anti-trust laws or to invalidate the said contracts; and that said clauses were inserted in said contracts because of the general requirement to that end, made by the Attorney General of the United States acting through the Department of Justice and the Fair Trade Commission, and were imposed solely in the

interest of the public and for the purpose of securing and effecting an equitable distribution of sugar and preventing speculation and profiteering therein. The contention was also made that the clauses were severable if found invalid.

Defendant Sugar Company also alleged that it had no notice of plaintiff's claims that the contracts were void, as being in restraint of trade, etc., until December 1, the day on which notice of rescission was served and the bill of complaint was filed; and that if plaintiff had notified it of the asserted invalidity of the contracts within a reasonable time subsequent to their execution, and it had acquiesced in such invalidity, a resale of the sugar, at a small loss to defendant, might have resulted; but that plaintiff had delayed advising defendant of its attitude and claims until the price of sugar had fallen so low that a cancellation or rescission of the contracts, as prayed for by plaintiff, would result in a loss to defendant of a sum in excess of \$300,000. [73]

The principal argument in the case centered around the asserted invalidity of paragraph 6, forbidding a resale of the sugar purchased.

CHARLES LEROY BROWN, IRA S. LIL-
LICK and JOHN S. PARTRIDGE, of San
Francisco, Attorneys for Plaintiff.

CUSHING & CUSHING, of San Francisco,
Attorneys for Defendant First National Bank.

H. U. BRANDENSTEIN, Esq., of San
Francisco, Attorney for Defendant Canton
Bank.

DONALD Y. CAMPBELL and GARRETT W. McENERNEY, of San Francisco, Attorneys for Defendant California & Hawaiian Sugar Refining Co.

BLEDSON, District Judge. (After Reciting Facts as Above).—This sugar was bought in time of war—war still existing legally, if not actually; we were surrounded and hampered by all of the emergencies and efforts growing out of the war and the resultant determination on our part to see that the war program was brought to a successful conclusion, plus the further exigencies and perhaps inconsistencies arising from our intensive efforts to effect some sort of a satisfactory readjustment from our participation in the war.

This contract then is to be weighed and tested, not by what might have been the situation in the year 1913 before the war began, or not what might be the situation years hence, when the immediate economic effects of the war shall have passed into history, but what the situation was in the spring and summer of 1920,—a period of uncertainty, insufficiency, readjustment and rehabilitation.

The Sherman Anti-Trust has recently been given very careful consideration by me in proceedings instituted by the government against the California Associated Raisin Company, and I have given it the best thought I could under the circumstances obtaining. I confess that you can read certain decisions emanating from the most exalted tribunal in the world, respecting the Sherman Anti-Trust Act, and then you can read other decisions emanat-

ing from the same tribunal, [74] and if you are only human you may be led to assert that they do not always seem to be consistent one with another.

But, aside from all other considerations, taking the decisions in the Tobacco case (221 U. S. 106), the Standard Oil case (221 U. S. 1), the Trans-Missouri case (166 U. S. 290), the Keystone Watch case (218 Fed. 502), and even the Steel Trust case of last spring (U. S. Sup. Ct. decided March 1, 1920), as I read them and as I now recollect them (recalling particularly the emphasis with which Mr. Justice Harlan dissented in some of those cases, and the growing vehemence with which he indicated that the Supreme Court was reading into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "The rule of reason")—taking all those cases into consideration, giving the latest expressions paramount weight, and endeavoring to arrive at the proper path to be travelled by us in the construction of the Sherman Anti-Trust Act, it seems to me that this much clearly lies within the realm of legal indispute: regardless of the precise and definite and seemingly controlling language of the statute, as the same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree.

The only way, or at least one of the most satisfactory ways by which you can determine what is the reasonableness or unreasonableness of the restraint put upon trade by a contract, is to consider the motive, extent and effort of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the various ends [75] they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effects, unreasonable, in its restraint upon the free flow of the commerce involved. So measured and tested, if it be unreasonable in its restraints upon trade, it lies within the prohibitions of the Sherman law; if not, that law has no concern with it.

It is common knowledge, I think, that during the war, and during the period subsequent to the actual cessation of hostilities, the question of the price, and the distribution, and the allocation of sugar in the United States, had attained to a great deal of importance; it was a question that occasioned considerable thought. I know that the exertions and the ramifications of the Department of justice had been multitudinous and of wide extent with respect to what should be done about the sugar question, as well as how it should be done. In my own court, during this very year, there have been at least two prosecutions under indictment, for the sale of sugar, both of them anterior to the transaction involved here, and having to do with the

alleged unlawfulness of the sale of sugar, at prices other than those fixed by governmental authority; one case, in which there was a conviction, because the defendants evidently were endeavoring to profiteer upon that necessary of life; in the other case there was an acquittal because, though the sugar had been sold at an advanced price, in excess of the price fixed by the controlling agency, there was lacking that intent sufficient to make it a criminal transaction, as the jury evidently viewed it. I call attention to these occurrences merely to indicate that there was a great deal of concern being manifested, publicly and privately, with respect to how sugar might be dealt with, to whom it might be sold, under what circumstances it might be delivered to this, that and the other place, and the prices which might lawfully be exacted [76] for it.

I know that down in Los Angeles—and I am assuming that the same conditions obtained here in San Francisco—for a long time sugar was sold only in small packages; you could get only one or two pounds at a time, and that, only with a stated amount of other groceries. I know that I have made more than one journey to the grocery store, at the behest of my wife, to buy a lot of other things we did not need—at least at the moment—in order that we might become possessed of a sufficient amount of sugar to satisfy the requirements of the day. So that everybody clearly understood that the existence of extraordinary conditions in the matter of the sugar supply made necessary the

imposition of extraordinary restrictions; and whether it was lawful or unlawful, whether the Government had the power to impose these restrictions and enforce them, or not, whether we knew it all, or not, or even, as intimated in the argument at the bar, whether we were proceeding along a path that was wrong economically—irrespective of what may have been the true solution of those problems and the true answers to those questions, we did appreciate that we were all joint participants in an elaborate and sustained effort to provide our people with sufficient of their normal appetites, at prices fairly within reach. As a part of the program in the effort to accomplish that result, we were limiting the sale, the transportation, the allocation of sugar very materially and substantially. And most people, I think, were accepting the situation in the same spirit in which it was tendered.

It is in evidence here that at the time these contracts were made, sugar was on a rising market,—and on a rising market due to a then present, or confidently expected, scarcity of sugar. It is obvious that that was the case, there was not enough sugar to go around. In order that others might not be entirely deprived, some [77] concerns, some individuals, or some territories had to be limited. I know that we had a Fair Price Committee down in Los Angeles, and they were very busily engaged in the matter; unusual efforts were being made to see, not that a few people got all of the sugar, but that everybody got some of

the sugar, if that could be made possible. Under those circumstances, the Fair Price Committee in this community, acting under the direction of the United States Attorney and the Department of Justice, conveyed information to this vender of sugar, the defendant Sugar Company, that it might sell 10,000 tons of Java white sugar under certain limitations, the limitations contained in the contract.

if is, of course, difficult for one to read another's mind; but my own judgment is that the intent of the parties, particularly the government agencies involved, respecting the inclusion of the controverted clause in the contracts, was, primarily, not to prevent the further disposition or the subsequent sale of this particular sugar, but to place such an inhibition upon its subsequent sale that the buyer would buy only the amount then deemed necessary for its own business requirements for the season; and this was in furtherance of what I conceive to be a very commendable plan on the part of those who gave their best thought to the matter;—that sugar should not be hoarded, should not be used unwisely; and that concerns should not, in view of the growing scarcity, become possessed of amounts of sugar outside of and beyond their real requirements, which they might thereafter, it being in excess of their requirements, make a sale of to their great profit and to the very considerable detriment of the purchasing public.

If this contract had been entered into in normal times, and if the defendant Sugar Company,

had inserted this clause in the contract with the intention on its part to prevent a subsequent [78] sale of this sugar in order that it, itself, thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced to the effect that that is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace, it is not a time for the normal operation of usual economic laws; it is a time of war a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known. These contracts were negotiated at a time when everybody was trying his best, was using his faculties to the very best advantage, to see if we might not be able to provide for the distribution of the necessities of life, of which sugar is one, in such form and fashion as to prevent some considerable menace being offered to the maintenance of social integrity, social harmony and well-being in our midst. . People wanted sugar as they wanted other things; and the aim of the Government, which was concerning itself with the peace and quiet of its people, no less than with the maintenance of its own perpetuity, obviously was to interest itself as best it might in the distribution of sugar, along with other things, in order that no substantial injustices might be done,

and that the greatest number of people who were craving the article might meet with satisfaction.

Under these circumstances, the Government indicated to these parties that this sugar could be sold lawfully, and, therefore sold at all, only if the clause providing for its use by the vendee and against its resale to any other person were inserted in the contracts. It seems to me that under such a state of facts, for this court now to hold that the clauses thus inserted were unreasonable in their nature, so unreasonable as within the terms of the Sherman Anti-Trust [79] Act to invalidate, and nullify, and render absolutely and completely void the entire contracts, would be to attempt the consummation of a thing under the guise of law which really would have not law, or reason, or justice to support it, and would tend to make of this government not a government of law, but a government of men.

There is no evidence in the case that I can see of any attempt, any malevolent motive, on the part of this vender of sugar, to do anything other than comply with what it and nearly everybody else at the same time understood to be the lawful, and the reasonable, and the proper, and the apt demands of governmental authority. Under those circumstances, to hold that in so doing, it must now, in virtue of what has transpired, meet the loss that has been sustained here—an amount in excess of three hundred thousand dollars—would be to work out such an obvious injustice as to shake the very foundations of the social structure which we have

erected here in our midst, and to undermine the confidence of men in government that it will see that private right is maintained and lawful engagements voluntarily entered into are made good.

Now, the truth of the whole thing is easily apparent; this case is here because sugar went down, and there was no thought of getting it here until sugar had gone down. If this contract was void—and that is the argument of counsel for the plaintiff—because of the inclusion of these clauses in it, then, of course, it was wholly void—void at the behest of the defendant in the case; it would have been void in the event of a continued rise in the market and a refusal on the part of defendant to deliver the sugar; would have been held void if the plaintiff had brought suit for damages for such refusal. If it was void in one case, it was void in the other. I can but faintly imagine, however, the [80] vehemence that would have been indulged in here in this court, in support of the argument on behalf of the present plaintiff, that such a clause, entered into under such circumstances, should not suffice to enable one to escape the just consequences of his reasonable and voluntary engagement.

But the shoe is on the other foot; the price of sugar having gone down, these people now seek to escape from the consequences of an unwise move on their part, the purchase of more sugar, really, than they needed in their business. The candy business also went down, as shown by the depositions here. There was less sugar needed

by it after the purchase than previously. Not only was there less sugar needed, but there was more sugar to be had and, therefore, the price went tumbling down. Five or five and a half months after the contract was entered into—five and a half months after they had had time to look it over carefully, five and a half months, no doubt, after it had been well thumbed by all of their various functionaries, for the first time, they came to the conclusion that it was an unlawful contract, an invalid contract, one that shocks the public conscience and is opposed to public policy, one that would result in creating an unreasonable restraint upon interstate trade; and after the sugar had been brought across the wide stretches of the sea and landed ready for delivery, and the price had gone down, and no opportunity was open to the defendant to recoup any of the tremendous loss which might have been overcome if an intimation had been conveyed to it three or four months previously, it is now proposed that this loss shall be borne, not by the buyer of the article who bought too much, but shall be borne by the seller of the article, who was merely trying to provide that which society was demanding of it, and in a way [81] then deemed least inimical to the welfare of society.

Aside from the fundamental disposition which I think should be in the breast of every man who expects to engage and continue in business in the United States of America—the disposition to live up to his contracts once he has entered into them

—I think there ought to be the further but equally prevalent disposition to take one's loss, when it comes, like a sport; and whether it be a loss of \$300,000, as here, or a loss of three hundred cents—having over-purchased, having over-bought, having failed to guess with becoming perspicacity as to the future, if one would contribute something to the well-being of our civilization, he will not seek to avoid such a contract as that—one entailing a loss in virtue of his want of foresight—because, forsooth, on the narrow ground that five months after he entered into it he got advice that it was unlawful. He should bear this loss—bear it like a man—even if the bearing of the loss mean bankruptcy. Unwelcome bankruptcy may be accepted with honor; unwarranted repudiation, however, is a continuing badge of dishonor. To do the honorable thing at all events, even in the face of loss, is a part of the game; it is a part of the burden. And it seems to me that it is the burden that ought to be maintained by the plaintiff in this case.

Defendant contends that the clause referred to is severable and therefore cannot in any event suffice to invalidate the entire contract. I have not had time to go into the authorities as to that and therefore express no final opinion respecting that phase of the case. I am somewhat of the belief, with respect to a clause that in normal times would be closely allied to the prohibitions of the Sherman Anti-Trust Act,—aimed and intended to benefit the public—that the court should be loath [82]

to hold it a severable clause and one not sufficient, in itself, to invalidate the contract as a whole. But that becomes unnecessary further to consider, and need not enter into the determination of the case at this time, because of the conclusions to which I have come, that, under the circumstances surrounding the transaction, the clause is in no wise an impingement upon the law as laid down by the Supreme Court in its construction of the Sherman Act.

For these reasons, I am of the belief that there is no occasion or propriety for this court at this time to seek to prevent the just consequences of this lawful angagement, lawfully entered into, from falling where they will.

The decree will be in the usual form—discharging the restraining order heretofore issued and dismissing the bill of complaint.

December 28, 1920.

[Endorsed]: Filed Feb. 11, 1921, *nunc pro tunc*
Dec. 28, 1920. Walter B. Maling, Clerk. [83]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY, a Corporation, THE
FIRST NATIONAL BANK OF SAN FRAN-
CISCO, CALIFORNIA, a Corporation, and
CANTON BANK, a Corporation,

Defendants.

Final Decree.

This cause came on for final hearing and was
argued by counsel, and the Court, upon due con-
sideration of the pleadings and the evidence, and
the arguments of counsel, doth now

ORDER, ADJUDGE AND DECREE that this
suit and the bill of complaint herein be, and the
same are and each of them is, hereby dismissed,
and that the defendants do have and recover from
the plaintiff their costs and suit herein to be
taxed.

ORDERED FURTHER that the order of tem-
porary injunction dated, made and filed herein on
December 8, 1920, shall, at twelve o'clock noon of
to-morrow, Wednesday, December 29, 1920, stand

vacated and set aside; and leave is hereby reserved to the defendants to proceed herein against the National Surety Company upon its undertaking filed herein December 8, 1920, as they may be advised.

ORDERED FURTHER that this decree shall operate as and have the effect of an assignment by Walter B. Maling, and Walter B. [84] Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the above-mentioned order of temporary injunction of December 8, 1920, to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling in any or all of the foregoing capacities by three certain instruments dated December 22, 1920, by each of which said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction and in the bill of complaint herein; and the said Walter B. Maling, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction dated December 8, 1920, is hereby empowered and directed, if and when requested so to do by the California and Hawaiian Sugar Refining Company, to execute any instruments necessary or appropriate, or believed by the California and Hawaiian Sugar Refining

Company to be necessary or appropriate, to evidence or effect the retransfer to it of the rights and interests transferred by it to said Walter B. Maling individually and in his several capacities above mentioned by the instruments of December 22, 1920, above referred to.

Dated December 28, 1920.

BENJAMIN F. BLEDSOE,
Judge.

Filed and entered Dec. 28, 1920. Walter B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk.
[85]

(Title of Court and Cause.)

(Here follows certified copy of final decree.)

No. 579.

United States Marshal's Return.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the writ of which the within is a certified copy, on the therein named, The First National Bank of San Francisco, California, a corporation, by handing to and leaving a true and certified copy thereof with J. K. Moffitt, Vice-president, of The First National Bank of San Francisco, California, a corporation, personally at the city and county of San Francisco, in said District on the 28th day of December, A. D. 1920.

San Francisco, Cal., December 28th, 1920.

J. B. HOLOHAN,
United States Marshal.
By I. W. Grover,
Deputy.

No. 579.

United States Marshal's Return.

United States of America,
Northern District of California,—ss.

I HEREBY CERTIFY AND RETURN that I served the writ of which the within is a certified copy, on the therein named, Canton Bank, a corporation, by handing to and leaving a true and certified copy thereof with E. F. Sagar, Manager of the Canton Bank, a corporation, personally at the city and county of San Francisco, in said District on the 28th day of December, A. D. 1920.

San Francisco, Cal., December 28th, 1920.

J. B. HOLOHAN,
United States Marshal.
By I. W. Grover,
Deputy. [86]

[Endorsed]: Filed Dec. 30, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

(Title of Court and Cause.)

Order for Substitution of Party Plaintiff.

On motion of Messrs. John S. Partridge, Ira S. Lillick and Charles Leroy Brown, solicitors and attorneys for plaintiff, and good cause appearing

therefor, and it appearing to this Court that Continental Candy Corporation, a corporation, has been adjudged a bankrupt, and that James B. A. Fosburgh has been duly appointed trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, and has qualified as such trustee as appears from the certified copy of the order approving trustee's bond, which is attached hereto and made a part hereof,—

NOW, THEREFORE, IT IS HEREBY ORDERED, that James B. A. Fosburgh, as trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, is substituted as plaintiff in the place and stead of plaintiff, Continental Candy Corporation, a corporation, who has since the entry of the final decree herein been duly declared and adjudged a bankrupt; that John S. Partridge, Esq., Ira S. Lillick and Charles Leroy Brown, may be entered as attorneys for the said trustee in the above-entitled proceeding, and that in all necessary pleadings and proceedings in the said action, the said substitution of said trustee and his said attorneys shall be deemed to have been made.

Dated June 25, 1921.

FRANK S. DIETRICH,
District Judge. [88]

At a Court of Bankruptcy, held in and for the Southern District of New York, at No. 31 Nassau Street, New York City, this 19 day of April, A. D. 1921.

In the District Court of the United States for the Southern District of New York.

IN BANKRUPTCY—No. 29,141.

In the Matter of CONTINENTAL CANDY CORPORATION,

Bankrupt.

Before JOHN J. TOWNSEND, Esq., Referee in Bankruptcy.

Order Approving Trustee's Bond.

It appearing to the Court that James B. A. Fosburgh, of New York County, and in said District, has been duly appointed Trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the order of the Court, to wit, in the sum of Fifty Thousand (\$50,000) Dollars, it is

ORDERED that the said bond be and the same is hereby approved.

J. J. TOWNSEND,
Referee in Bankruptcy.

A true copy.

[Seal]

ALEX. GILCHRIST, Jr.,
Clerk.

[Endorsed]: Filed June 25, 1921. Walter B. Maling, Clerk. [89]

(Title of Court and Cause.)

**Stipulation and Order Enlarging Time of Appellee,
California and Hawaiian Sugar Refining Com-
pany, a Corporation, One of the Defendants
Above Named, Under Equity Rule 75, to and
Including July 18, 1921.**

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including July 18, 1921.

JOHN S. PARTRIDGE,

IRA S. LILLICK,

CHAS. LEROY BROWN,

BROWN, FOX & BLUMBERG,

Attorneys for Plaintiff and Appellant.

Dated: July 1, 1921.

So ordered.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jul. 1, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [90]

(Title of Court and Cause.)

**Stipulation and Order Enlarging Time of Appellee,
California and Hawaiian Sugar Refining Com-
pany, a Corporation, One of the Defendants
Above Named, Under Equity Rule 75, to and
Including August 2, 1921.**

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including August 2, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLYCK,
CHAS. LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Dated: July 14th, 1921.

So ordered.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed Jul. 14, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [91]

(Title of Court and Cause.)

**Stipulation and Order in Reference to Settlement
of Statement of Evidence Under Equity Rule
75.**

IT IS HEREBY STIPULATED AND AGREED (a) that notice that the plaintiff's proposed statement of evidence under Equity Rule Number 75 was lodged with the Clerk on June 27, 1921, is hereby waived; (b) that if the plaintiff was under obligation heretofore to give notice designating a time and place for the settlement of the proposed statement of evidence, his failure to do so is hereby waived; (c) that said statement of evidence shall be settled and allowed by the Court, upon stipulation by the respective counsel hereto, or if said counsel are unable to agree upon said statement, then at a time and place and by a Judge to be hereafter agreed upon by counsel for the respective parties hereto; (d) and if counsel are unable to agree in respect of the matters provided in subdivision "c" hereof, then said statement shall be settled and allowed as provided by law and upon the usual notice for such cases made and provided.

Dated: July 16th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILICK,
CHARLES LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.
DONALD Y. CAMPBELL,
GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian
Sugar Refining Company, a Corporation.

Attorney for The First National Bank of San Fran-
cisco, California, a Corporation.

DONALD Y. CAMPBELL,
Acting in Absence of, and with Consent of, H. U.
Brandenstein, Attorney for Canton Bank, a
Corporation.

It is so ordered.

WM. W. MORROW,
Circuit Judge. [92]

[Endorsed]: Filed Jul. 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

(Title of Court and Cause.)

**Stipulation and Order Enlarging Time of Appellee,
California and Hawaiian Sugar Refining Com-
pany, a Corporation, One of the Defendants
Above Named, Under Equity Rule 75, to and
Including August 12, 1921.**

IT IS HEREBY STIPULATED that the time

of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including August 12th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHAS. LEROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff and Appellant.

Dated: August 1st, 1921.

So ordered.

VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [94]

(Title of Court and Cause.)

**Stipulation and Order Enlarging Time of Appellee,
California and Hawaiian Sugar Refining Com-
pany, a Corporation, One of the Defendants
Above Named, Under Equity Rule 75, to and
Including September 1, 1921.**

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the

Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is hereby extended until and including September 1, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
BROWN, FOX & BLUMBERG,
CHAS. LEROY BROWN,

Attorneys for Plaintiff and Appellant.

Dated: August 11th, 1921.

So ordered.

VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 11, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [95]

(Title of Court and Cause.)

**Stipulation and Order Enlarging Time of Appellee,
California and Hawaiian Sugar Refining Com-
pany, a Corporation, One of the Defendants
Above Named, Under Equity Rule 75, to and
Including September 7, 1921.**

IT IS HEREBY STIPULATED that the time of the appellee, California and Hawaiian Sugar Refining Company, a corporation, one of the defendants above named, to file or lodge with the Clerk of the above-entitled court its praecipe, objections and amendments to appellant's (plaintiff's) statement of evidence under Equity Rule 75, is

hereby extended until and including September 7, 1921.

Dated: August 30th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILICK,
BROWN, FOX & BLUMBERG,
CHAS. LEROY BROWN,
Attorneys for Plaintiff and Appellant.

So ordered.

VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 31, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [96]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate
of CONTINENTAL CANDY CORPORA-
TION, a Corporation, a Bankrupt,
Plaintiff,

vs.

CALIFORNIA & HAWAIIAN SUGAR REFIN-
ING COMPANY, a Corporation, THE
FIRST NATIONAL BANK OF SAN
FRANCISCO, CALIFORNIA, a Corpora-
tion, and CANTON BANK, a Corporation,
Defendants.

Statement of Evidence Under Equity Rule 75.

BE IT REMEMBERED, that the trial of this cause was had in this Court, at the November term thereof, on December 27th and 28th, 1920, before the Court sitting in equity, the Hon. Benjamin F. Bledsoe, District Judge, presiding, Ira S. Lillick, Esq., and John S. Partridge, Esq., appearing on behalf of the plaintiff Mr. J. L. Fox, attorney at law of Chicago, partner of Mr. Charles Leroy Brown, one of the attorneys of record for the plaintiff, and a member of the firm of Messrs. Brown, Fox & Blumberg, Attorneys at Law, Chicago, was also in attendance on behalf of the plaintiff. Donald Y. Campbell, Esq., and Garret W. McEnerney, Esq., appeared on behalf of the defendant, California and Hawaiian Sugar Refining Company. Charles S. Cushing, Esq., and E. E. Richter, Esq., appeared for the defendant, First National Bank of San Francisco, and H. U. Brandenstein, Esq., appeared for the defendant, Canton Bank. The following [97] proceedings were had and the following testimony given, orally and/or by deposition:

Before the trial commenced and at the opening of court on December 27, 1920, the defendant California and Hawaiian Sugar Refining Company filed and made three motions which were in writing, and are hereinafter set out in full. Notices of said motions had been duly and regularly served upon the plaintiff, and the motions came on regularly to be heard. The motions read as follows:

“(Title of Court and Cause.)

MOTION TO VACATE AND SET ASIDE ORDER OF TEMPORARY INJUNCTION.

“Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order vacating and setting aside the order of temporary injunction heretofore made and filed in the above-entitled suit on December 8, 1920, upon each of the following grounds:

1. Since the making and filing of the aforesaid order of temporary injunction, this defendant has presented to Canton Bank, one of the defendants herein, drafts in conformity with and drawn under and pursuant to the letter of credit issued by Great Lakes Trust Company of Chicago in the sum of \$255,800.00, and has presented to the First National Bank of San Francisco, one of the defendants herein, drafts in conformity with and drawn under and pursuant to the letter of credit issued by the First National Bank of Chicago in the sum of \$300,000.00, and at the time of presenting said drafts delivered to said banks respectively, an order directing and requesting the payment of the moneys thereunder to W. B. Maling, Special Master, appointed by said order of temporary injunction and authorized thereby to receive payment thereof. Notwithstanding said facts, each of said

banks has refused to pay any of said moneys to said Special Master or at all, and no payments have been made on account of said drafts or any of them, or under or pursuant to said letters of credit, or either of them.

2. The plaintiff herein has refused and still refuses to consent to the payment to the Special Master appointed by said order of temporary injunction of the amount of the drafts heretofore drawn and presented under and pursuant to the aforesaid two letters of credit, and refuses to indemnify the banks upon which said drafts have been drawn respectively, against any claim of liability by said plaintiff, or against the loss or forfeiture of any right or [98] cause of action by said banks respectively, against the plaintiff, growing or arising out of the payment by said banks respectively to the said Special Master of the amount of the drafts drawn upon said banks respectively by this defendant, under and pursuant to the said letters of credit in the event of the payment of said drafts by said banks to said Special Master.

WHEREFORE this defendant prays the judgment of this Honorable Court vacating and setting aside the aforesaid order of temporary injunction heretofore made and filed herein on December 8, 1920.

Dated: December 27, 1920.

DONALD Y. CAMPBELL,

GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian
Sugar Refining Co.”

“(Title of Court and Cause.)

MOTION TO DISMISS BILL OF COMPLAINT.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, moves this Honorable Court for an order directing the dismissal of the bill of complaint herein, for the reasons and upon the grounds that it appears upon the face of said bill of complaint that:

1. The plaintiff is not entitled to the relief prayed for by its Bill of Complaint against this defendant, nor to any relief arising from the facts alleged in said bill of complaint;

2. Said bill of complaint is wholly without equity;

3. There is a nonjoinder of necessary parties defendant herein, in this, that the First National Bank of Chicago, and Great Lakes Trust Company, the two Chicago banks which upon the procurement of the plaintiff have heretofore issued to this defendant the letters of credit mentioned in said Bill of Complaint, upon which the plaintiff seeks to enjoin this defendant from valuing, and against which it seeks to enjoin this defendant from draw-

ing or presenting drafts, are neither of them joined as a party defendant;

4. The plaintiff acquiesced in the validity of each of the contracts of sale dated May 14, 1920, and May 18, 1920, respectively, and in the validity thereof, from the date of said respective contracts until December 1, 1920, and made no claim of the invalidity of said contracts or either of them, despite the fact that during all of said time the market price of sugar of the quality and grade covered by each of said contracts was steadily falling, and that by reason thereof the plaintiff has disintitiled itself to any relief in equity, and it would be contrary to equity and good conscience for the Court to take cognizance of said Bill of Complaint or to allow the plaintiff to maintain the same.

5. Plaintiff has a plain, adequate and complete remedy at law in respect of the matters complained of in said [99] bill of complaint.

WHEREFORE, and for divers other good reasons of objections appearing upon the face of said bill of complaint, this defendant prays this Honorable Court for an order directing the dismissal of said bill of complaint, and allowing this defendant its reasonable costs in this behalf sustained.

Dated, December 27, 1920.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,

Attorneys for Defendant, California and Hawaiian
Sugar Refining Co.”

“(Title of Court and Cause.)

MOTION FOR CALLING UP AND DISPOSITION OF SEPARATE DEFENSES CONTAINED IN ANSWER OF DEFENDANT CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.

Now comes California and Hawaiian Sugar Refining Co., one of the defendants in the above-entitled action, appearing separately and for none of the other defendants herein, and in accordance with its notice of intention so to do heretofore filed and served herein, and in accordance with Equity Rule No. 29, moves this Honorable Court to at once proceed to separately hear and dispose of each and every of the separate answers and defenses contained in the answer of this defendant before proceeding with the trial of the principal case and before proceeding to a final hearing in said cause, and does hereby move said Court for an Order Directing the Dismissal of said Bill of Complaint for each and every of the reasons and grounds set forth and contained in said separate defenses, and in each of them.

Dated, December 27, 1920.

DONALD Y. CAMPBELL,

GARRET W. McENERNEY,

Attorneys for defendant, California and Hawaiian Sugar Refining Co.”

These motions were presented to the Court on behalf of the defendant, California and Hawaiian

Sugar Refining Company by Mr. McEnerney, and in the presentation thereof, he said:

“We shall ask your Honor, before we conclude our motion, to vacate and set aside the temporary injunction, that we be permitted to call certain witnesses whose position in true alignment would be with the plaintiff, although they are named [100] as defendants in this case with us, namely, officers of the First National Bank of San Francisco and of the Canton Bank of San Francisco.”

In the course of the presentation of these motions, Mr. McEnerney stated that on December 1, 1920, the defendant California and Hawaiian Sugar Refining Company was served with a notice by the original plaintiff herein, Continental Candy Corporation, a corporation, rescinding the contracts for the sale and purchase of sugar, dated May 14th and May 18th, 1920, respectively, in which rescission was put upon six grounds, one of which was the defendant Sugar Refining Company had failed to ship the sugar as per contract, whereupon the following occurred:

“Mr. PARTRIDGE.—That question of shipment is specifically waived. The shipment was made in time.

The COURT.—And there is no controversy about that?

Mr. PARTRIDGE.—There is no controversy about that.”

“Mr. McENERNEY.—Since December 8, 1920, we have complied with every term of the contract, and with every term of each of the letters of credit,

and we have presented our drafts for payment. I hand your Honor copies of these three drafts, and I give copies to the gentlemen on the other side. (The drafts were then handed to Court and counsel.)

The first two drafts, aggregating \$300,000, are drawn on the First National Bank of Chicago; the other one, for \$255,800 is drawn on the Great Lakes Trust Company. They are endorsed in blank. Our papers, as we shall presently show, are in order. Accompanying those drafts, if your honor please, was an order that they should be paid to Walter B. Maling. I will ask your Honor, as we shall presently prove them, to look at the [101] three orders, one accompanying each of the drafts, requiring their payment to Mr. Maling. They are all in the same language, if your Honor please, except two, in similar form, are addressed to the First National Bank of Chicago, and its correspondent here, and deal with two drafts, and the other, one on the Great Lakes Trust Company, and the Canton Bank here, and deal with the third one.

The banks refused payment. As we shall presently prove the receipt of these documents, I hand your Honor a photostat copy of a letter of December 1, 1920, to us from the Canton Bank, and a two-page letter addressed to us by the First National Bank of San Francisco on December 23, 1920, in which, as I understand that letter, they say they were then and there prepared to pay us, but for the presence of the injunction. I ask to hand

those to your Honor. (Copies of these two letters were then handed to Court and counsel for plaintiff.)

In the course of the presentation of these motions, Mr. McEnerney presented and submitted to the Court two telegrams from the Great Lakes Trust Company to the California and Hawaiian Sugar Refining Co., which telegrams read as follows:

(These telegrams were later introduced in evidence by defendant C. & H. R. Co., as part of their Exhibit "S.") [102]

Defendants' Exhibit "S."

WESTERN UNION TELEGRAM.

C165ch 136 1 Extra Rush 1920 Dec 23 PM 1 37
Ax Chicago Ill 238P 23
California and Hawaiian Sugar Refining Co—395
San Francisco Calif

Replying your wire twenty third December nineteen twenty Stop Funds are now as they always have been available for payment or drafts drawn against our letters of credit and no action on our part or on part of our correspondent can be by you construed as a refusal on our part to honor any drafts drawn against such letters of credit Stop We note from your wire that drafts as presented have not been made payable to Mailing Special Master and by him endorsed Stop We stand ready able and willing to pay drafts presented against our letters of credit when same are presented in proper form with necessary papers attached and in accord with terms of letter of credit and payment such as not

to involve us or our correspondent in California injunction proceedings

GREAT LAKES TRUST CO.

WESTERN UNION TELEGRAM.

D126ch158 1/74

1920 Dec 24 AM 11 48

Ax Chicago Ill 113P 24

California and Hawaiian Sugar Refining Co 379
San Francisco Calif.

Replying your telegram twenty fourth December Stop Our general counsel today advises us that injunction expressly restrains [103] sugar company from taking or receiving payment of any drafts and from negotiating or assigning or making payable to any third person any drafts except as may be necessary merely for presentation and demand for payment and that in the event any draft is negotiated or assigned or made payable to any third person for the purpose specified the endorsees and payees of the sugar company are also enjoined to the same extent as the sugar company Stop We are not parties to the injunction but our correspondent is Stop The question presented is whether or not under the injunctional order our correspondent can pay either to Mailing or on his endorsement Stop Shall appreciate wire from you enlightening us as to opinion your counsel on these legal complexities as naturally we desire avoid placing our correspondent in contempt of court.

GREAT LAKES TRUST COMPANY. [104]

Mr. McEnerney here produced and submitted to his Honor three telegrams from the Sugar Refining

Company to the Great Lakes Trust Company, which telegrams read as follows:

(These telegrams were later introduced in evidence by defendant, C. & H. R. Co., as part of their Exhibit "S.") [105]

San Francisco, December 22, 1920.

Great Lakes Trust Company,

110 South Dearborn Street,

Chicago, Illinois.

We have today presented to the Canton Bank of this city our draft number two nine five dash A for two hundred fifty five thousand eight hundred dollars drawn upon you to our own order and endorsed in blank all in conformity with your irrevocable letter of credit number ten seventy three issued to us June first nineteen twenty Stop At the same time we presented to the Canton Bank an order executed by us whereby you were requested to pay the amount of said draft to Walter B. Maling a copy of which order appears at foot of this telegram Stop At the time this presentation Walter B. Maling was present in the Canton Bank ready and able to take payment of the amount of said draft Stop At the same time we presented to the Canton Bank all documents which are required by the terms of your letter of credit to accompany our draft Stop At the time of the presentation we were represented by our president and secretary who then and there had power and authority to execute any supplemental or additional papers which might be required by you as in conformity with the terms of your letter of credit Stop The

Canton Bank advised us that they would not accept the responsibility of passing upon our papers and also that they would not negotiate the draft and that they had no funds of yours available for the cashing of the draft Stop Under these circumstances please advise us whether or not it is your intention to provide funds for the payment of this draft or whether we are to treat the situation of today as a refusal by you to honor any draft drawn by us under your letter of credit Stop The above order to pay to Maling reads as follows begin quote San Francisco December [106] twenty second nineteen twenty Great Lakes Trust Company parenthesis Chicago end parenthesis Canton Bank parenthesis San Francisco end parenthesis acting as the agent representative and correspondent of Great Lakes Trust Company parenthesis Chicago end parenthesis and Canton Bank acting in its own right gentlemen please play our annexed draft number two hundred ninety five a for two hundred fifty five thousand eight hundred dollars to Walter B Maling or to Walter B Maling Special Master or Walter B Maling Special Master for the purposes specified in a certain order of temporary injunction dated and filed December eighth nineteen twenty in case number five hundred seventy nine in the Southern Division of the United States District Court for the Northern District of California Second Division in Equity of which order of temporary injunction you have theretofore received a duly certified copy this is addressed to you jointly and to each of you severally California

and Hawaiian Sugar Refining Company by Wallace M. Alexander President by Warren H. McBryde Secretary and quote please wire reply.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY.

Charge.

San Francisco, December 23, 1920.

Great Lakes Trust Company,

Chicago, Illinois.

Thanks for your telegram Stop Referring to your suggestion about Maling it is our opinion that an order to pay to Maling attached to our draft is equivalent to making it payable to him on the back of the draft Stop If however you desire us to do so and are prepared to pay in the event we do so we will so endorse the draft to the order of Maling in any form you suggest and shall see to it that it is endorsed by him in any form suggested by you Stop Kindly telegraph whether under these circumstances you will [107] pay and if you wish this course to be pursued by us Stop We also stand prepared to do anything within reason to meet any suggestions or requirements which you will have the kindness to wire us Stop Please wire reply.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY.

Charge.

San Francisco, December 24, 1920.

Great Lakes Trust Company,

110 South Dearborn Street,

Chicago, Illinois.

Our counsel advises us that your correspondent

is enjoined from paying under your letter of credit to any person except Maling, but that express authority is given by the injunctional order to your correspondent to pay Maling Stop The provision permitting payment to Maling presupposes of course that payment to Maling would not be made by your correspondent unless we so requested and we therefore executed the order addressed to you and your correspondent asking for payment of the draft to Maling Stop Maling was present when the documents were presented to your correspondent in order that he might personally take payment. Stop Our counsel concur with your counsel in saying that the injunctional order provides that we may present our drafts and demand payment Stop It is true that we are forbidden ourselves to take payment, but the injunctional order expressly provides that we may request you to pay to Maling Stop This we did in our order presented to your correspondent, and as already stated Maling was present to receive payment Stop Please consider the suggestions following Stop Obviously if there were no injunction, we could make our draft payable to the order of Maling Stop The injunction does not prohibit us from [108] making draft payable to Maling but on the contrary expressly provides for payment to him Stop In these circumstances we have complied with the terms of your letter of credit and with the terms of the injunctional order and we hope you will concur in this view and advise your corre-

spondent to take up our draft Stop Kindly reply by wire.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY.

Night Letter—W. U. [109]

Mr. McEnerney stated that before concluding his motion to vacate and set aside the temporary injunction, he would ask the Court to be permitted to call certain witnesses who were officers of the First National Bank of San Francisco and of the Canton Bank of San Francisco, and continued his statement of the facts he proposed to put before the Court.

Mr. McENERNEY.—I now ask to call Mr. James K. Moffitt, the cashier and vice-president of the First National Bank of San Francisco.

The COURT.—These banks are parties here, and are represented, aren't they?

Mr. McENERNEY.—Yes, your Honor.

The COURT.—Perhaps we can ascertain from them, on inquiry, what their position and plan is. Isn't that true?

Mr. McENERNEY.—Yes, your Honor.

Mr. CUSHING.—That letter that was presented the other day by the First National Bank, in which it expressed its willingness to pay, on the documents being sufficient, expressed our ideas on that tender at that time, that we were prevented from paying it by the injunction. The papers at that time seemed to be in perfect order. And as stated there, our answer was given in that letter of our

willingness to pay if the injunction had not existed at that time.

The COURT.—Does that mean that you are willing to pay now in the event the Court construes that that injunction in no way acts as an inhibition on you?

Mr. CUSHING.—That would be our position, when a presentation is made, if your Honor please—in other words, we do [110] not desire to answer anything for the future, what may be the conditions to-morrow, or the next day, because we don't know what might happen in a fast-moving proposition like this is. Our position is now, if the injunction does not exist, and the papers are regular, we shall comply with the letters of credit. We have no desire to do otherwise.

The COURT.—Well, there seems to be no lack of clarity in that answer, Mr. McEnerney.

Mr. CUSHING.—And Mr. Moffitt says that at the time the papers were presented they were in regular form, and that we were willing to pay then if we had not been prevented by the injunction.

Mr. BRANDENSTEIN.—And the position of the Canton Bank is that it is under no obligations to honor the letters of credit on the drafts. It acted merely as a matter of accommodation to the bank in Chicago. Before this suit was brought it withdrew, it occupies no legal relation to the bank in the East which would obligate it to recognize these drafts or these letters of credit. And that is the position expressed in our letter to the California

& Hawaiian Sugar Refining Company before the suit was brought.

Mr. McENERNEY.—On the day the suit was brought, wasn't it?

Mr. BRANDENSTEIN.—As a matter of fact, Mr. McEnerney, the letter was written before the suit was brought. We can establish that by Mr. Sagar. We can establish that beyond doubt. We withdrew.

Mr. McENERNEY.—Did you receive a notice from the Candy Company that they had rescinded this contract, and was that the occasion of this letter. [111]

Mr. BRANDENSTEIN.—No. They admonished us by telegram, I think, that certain questions had arisen and they didn't want us to honor the letter of credit presented.

Mr. McENERNEY.—You mean the Great Lakes Trust Company did?

Mr. BRANDENSTEIN.—Yes, I think so.

Mr. McENERNEY.—I will offer for your Honor's consideration two letters dated June 8, 1920, and December 10, 1920, whereby the First National Bank of San Francisco associated itself with and became obligor on this letter of credit. Said letters read as follows:

(They were later introduced in evidence by defendant C. & H. R. Co. as Exhibit "Q.") [112]

Defendants' Exhibit "Q."

**THE FIRST NATIONAL BANK OF SAN
FRANCISCO.**

Established 1870.

Capital \$3,000,000. Surplus \$1,500,000.

San Francisco, June 8th, 1920.

California & Hawaiian Sugar Refining Company,
San Francisco,
California.

Gentlemen:

We have received from the First National Bank, Chicago, copies of your Letters of Credit, No. GCA-6385 and GCA-6414, for \$300,000.00 and \$19,564.16 respectively, both issued in your favor. These credits are irrevocable and are hereby confirmed, and we stand in readiness to pay your draft drawn under their provisions.

Very truly yours,

L. F. CADOGAN,
Assistant Cashier.

LFC:N.

**THE FIRST NATIONAL BANK OF SAN
FRANCISCO.**

Established 1870.

Capital \$3,000,000. Surplus \$1,500,000.

San Francisco, December 10, 1920.

Mr. A. A. Brown, Sales Manager,
California Hawaiian Sugar Refining Company,
230 California Street, San Francisco.

My dear sir:

Referring to the letter of credit hitherto issued in your favor by the First National Bank of Chi-

cago, covering sales of Java sugar to the Continental Candy Company, Chicago: [113]

We are in receipt of a wire from the First National Bank of Chicago, instructing us to quote you therefrom, as follows:

“We wish to make clear that litigation in San Francisco was started against our advice, and we have no desire to escape any liability on any Letter of Credit issued by us. As to sugar testing up to requirements, we assume Continental Candy having attempted to rescind contract, will not inspect sugar or shipping documents. We authorize you to take a guarantee from the California and Hawaiian Sugar Company that the sugar conforms with the requirements of our credit both as to quality and date of shipment. If California and Hawaiian would be willing to give us copies of tests and reports made on sugar by their testor and copy of bill of lading showing shipment from Java, we will appreciate it. If there is anything which California Hawaiian Sugar Company thinks we should do in good faith, have them advise us and we will consider whether we can meet their wishes.”

If your company furnishes a guarantee as requested by the First National Bank of Chicago, we, of course, assume the right to have our attorneys pass upon the sufficiency of the guarantee or to submit it for the approval of the First National Bank of Chicago.

We await your advices as to when drafts may be presented to us, drawn under the Credit, and as to whether you will conclude to conform with the wishes of our friends, the First National Bank of Chicago, as indicated above.

Very truly yours,

J. K. MOFFITT,

Vice-president.

JKM:W. [114]

Mr. CUSHING.—And Mr. Moffitt, of the First National Bank, has stated to us that he wishes it to be stated here that the First National Bank made no point about the fact that it had associated itself on the letter of credit. We expressly said that. At the time of the injunction we were associated with it and made ourselves parties to it. Mr. Moffitt says he desires that to be stated. And you will remember that we set that up, Mr. McEnerney.

Mr. McENERNEY.—Yes, I don't offer this on the theory that there is any controversy between the First National Bank of San Francisco and ourselves as to that. The First National Bank of San Francisco set up a letter which they received from the First National Bank of Chicago, asking them to take on the burden of that letter of credit. They then set up a letter, which we have from them, associating themselves with it. Then the next letter that we have from them is a letter of December 10, 1920, the circumstances of which I shall prove if I may be permitted to. The injunction in this case was issued on December 8th. That night the First National Bank of San Francisco

or its counsel wired the full text of that order to the First National of Chicago, and the First National Bank of Chicago either on the 9th or 10th, sent to the First National Bank of San Francisco its telegram which they embodied on December 10, 1920, in a letter addressed to us and which we interpreted to mean that all parties having read the order of injunction on the 8th, and knowing its contents, they would pay, but when we presented our papers they did not pay.

Mr. CUSHING.—It is needless to say on that particular point, Mr. McEnerney, that in our opinion we did not state any such thing. We merely quoted the statement of the Chicago Bank that on certain points about the presentation to the banks they [115] would take your representations. And, Mr. McEnerney, as a matter of fact, as we have stated here, when the presentation was made we did not make any objection on those grounds.

The COURT.—This letter of June 8th seems to be in itself an irrevocable assumption of obligation.

Mr. McENERNEY.—Yes, it is; they do not dispute that, and never have.

Mr. CUSHING.—We make no point on that.

The COURT.—Is there anything in the case now with respect to the lack of support of this guarantee that is spoken of?

Mr. McENERNEY.—No; we fulfilled those requirements. There is no point between us.

Mr. CUSHING.—There is nothing whatever really in the case except the presentation of that; the First National Bank is willing to stand by the

letter of credit in its terms, and there is no point about that.

Mr. McEnerney thereupon made the following statement:

Mr. McENERNEY.—This seems to be the position of the First National Bank, if I may interpret it: They are prepared to pay and to honor the obligations on this letter of credit if the transaction is in form to satisfy the requirements of the letter of credit, and they are of the opinion that the presentation which we made does not fulfill the requirements of the letter of credit, because we are forbidden ourselves to collect, and that our order to pay, with our drafts endorsed generally, does not call for the payment by them. They are willing to pay if payment is called for by the transaction, but they are not willing to pay if it is not called for by the transaction, for they assume that in that event they would not have claims over against their correspondent, [116] and they might feel that, no matter what interpretation your Honor might put on this injunction, they would still stand the risk of that being held not the true interpretation of the injunction, if they had occasion to bring suit against the First National Bank of Chicago; so that, if we are to be protected, if the First National Bank is to be protected and to be relieved of being called upon to decide at its peril whether our tender does or does not create and fix their liability, the injunction should be dissolved under circumstances which would bring the money into the hands of Mr. Maling.

Your Honor, this I might mention, because this is one of our points on which we rely to sustain our proposition that the bill should be dismissed for want of indispensable parties; nothing that your Honor could do here will be binding on either of the Chicago banks. They are parties to a contract with us, the First National Bank of Chicago and the Sugar Refining Company; the Great Lakes and the Sugar Refining Company. There is an attempt here to cancel in effect these two letters of credit with the presence of one party here only to the contract. I am speaking now as though no San Francisco bank had ever intervened in the matter. We hold a letter of credit from the Chicago National Bank, and the Candy Company is here seeking to annul that letter of credit without the presence of the First National Bank of Chicago. That does not tell the whole story. The First National Bank of San Francisco, upon the request of the First National Bank of Chicago, associated itself with this letter of credit, and, as your Honor has said, made that letter of credit its irrevocable letter of credit. Now, we take in papers, which we shall claim, if we have no other protection, constituted a full compliance with the terms of the letter of credit, and [117] when the First National Bank refused to pay those two drafts for \$300,000 it became liable for the \$300,000, but it is advised by its counsel that it is not liable for those \$300,000, and, acting upon that assumption, it is put in the position where it cannot make reclamation against the First National Bank of Chicago, because, for-

sooth, they would say, You have denied liability upon this demenad and you cannot collect from us or hold us in respect of that liability which you, yourself, deny. Then in the course of events it might turn out that our legal opinion of the point was sound and the opinion of counsel for the First National Bank unsound, and we would recover our \$300,000 from them, and they not recover it from the First National Bank of Chicago.

The COURT.—The thing I cannot quite grasp, Mr. McEnerney, is the necessity or desirability at this time of entering into a consideration of the exact rights or the status of the relationship subsisting between these banks here and the banks of Chicago. If this be a valid and enforceable contract, then, of course, you are to employ such means and take such steps and take advantage of such rights as the law of the country affords you; if it be an invalid and illegal contract, it would be the duty of a court of equity to preserve the rights of the parties in so far as the Court is called upon to, and possesses jurisdiction so that no inequity will be done and no wrong done. Now, isn't the Court here concerned only with the question as to whether or not these contracts display illegality?

Mr. McENERNEY.—Not when it is dealing with a motion to dissolve a temporary restraining order, the object of which is to bring the money into the court to abide the final decree, because it is one of the elementary rules in respect to interlocutory injunctions, *they* they should not be used to decide the case in [118] its ultimate right, and that

their function should be to protect the parties so that when the judgment is decreed finally it will be there able to see to it that no harm has been done to either party.

The COURT.—That will become of moment in the event that the Court should conclude that this injunction should be maintained. If it did that, then in order to protect your rights in the event that the Court should be wrong in its conclusions in that behalf, it would take such action as would enable you in the long run to become possessed of that which it might hereafter be determined you are entitled to.

Mr. McENERNEY.—But in its last analysis, this is a suit between the Candy Company and the Sugar Refining Company.

The COURT.—I understand that.

Mr. McENERNEY.—Over \$555,800. There have been people brought into it, we might say collaterally, and we have rights against those people collaterally, and all that we want to do is to be absolutely certain that if we win this case our rights against these collaterals will not have been destroyed, impaired, or imperiled.

The COURT.—But the point to my mind is, are we to bother with that question at the very inception of the hearing. If the injunction is dissolved, then you are not concerned about the relationship between these parties, you have got your payment that the contract provides for.

Mr. McENERNEY.—The point is this, if there

was 60 days' time to come and go, I would not be making this motion.

The COURT.—Why not proceed with the question as to whether or not this injunction should be continued? If the Court, after hearing both parties here, concludes that the injunction [119] should be continued, then we will take up the question of protecting you and your rights. If the Court concludes the injunction is not warranted and that it should be at once dismissed, then you have your rights as the law provides.

Mr. McENERNEY.—Does it occur to your Honor now that we might proceed to take the testimony and close it up in that way, because—if your Honor please—

The COURT.—Take the testimony with respect to what?

Mr. McENERNEY.—With this point about the late shipping from Java out of the case, the only testimony in the case is the question whether these clauses were introduced into these contracts under the direction of the Department of Justice.

Mr. PARTRIDGE.—If you will pardon me, Mr. McEnerney, there is a further consideration, and there may be several very important considerations which are covered by a deposition in Chicago as to the allegations of the bill that what we call Clause 6 of the contract, the clause providing that under no circumstances shall this sugar be resold, was inserted at the behest and demand of the California & Hawaiian Sugar Company, and over the protest of the Candy Company. Now, that is covered fully

by a deposition that we have from Chicago. The matters in regard to the Governmental direction or orders, if you will, are also taken up in certain depositions that were taken in the City of Washington. I was going to suggest that in so far as any issue of fact is concerned, or any question that may be presented to your Honor's mind by testimony is concerned, that we can conclude that in a very short time, and that the properly and orderly way to proceed is to go ahead with that.

Now, on the question of fact, we have also subpoenaed the Secretary of the California & Hawaiian Sugar Refining Company [120] to bring here other contracts made for sugar, having in mind the question as to whether they contained this prohibition against resale, and also their books showing who are the stockholders of that corporation as bearing upon the question whether they are a monopoly in fact. Now, these matters are matters that we can certainly conclude within a short time.

Mr. PARTRIDGE.—I want to say now, if your Honor please, that it is our purpose, in so far as we are able, to divest the presentation of this case of everything but the single, solitary proposition as to whether or not this contract is in restraint of trade and, therefore, void.

Mr. McENERNEY.—I just want to make one more suggestion: They say they have subpoenaed our secretary to show who our stockholders were on the theory that thereby they would show that we were a monopoly and an outlaw against whom every

man's hand might be raised in safety. That same point, if your Honor please, was dealt with in that little leaflet I handed you in Wilder Manufacturing Company vs. Corn Products Refining Company, where a manufacturer using glucose thought he could beat a contract for the price of goods sold, first, upon the ground that the plaintiff was an outlawed monopoly anyhow, and, secondly, because the contract contained a clause against resale, and for buyer's own consumption. So that when that time comes we shall ask your Honor, on the authority of that case and a number of other cases, to hold that if the contract is legal they are in no position to wage war against it on the theory that we are a monopoly, because, as a monopoly, we have not done them any damage. It would be the same, if your Honor please, if we owned an office building in Chicago and rented the Candy Company a floor. That is laid down and decided in so many cases that [121] there is no discussion about that. We learned that, your Honor, when you sat in the State Court, that it is a rule in California and it is a rule of general jurisprudence that you cannot collaterally attack the existence of a *de facto* corporation, and that same rule runs under the Sherman Act, and under the Clayton Act, and under the general jurisprudence as administered in equity in this court and in all federal courts, and in all state courts. But, if your Honor thinks, in view of Mr. Partridge's statement, that the taking of this testimony will occupy a very short period of time, that we had better take all the testimony and sum up

all of this question at once, I am willing to take your Honor's direction.

The COURT.—I do not want to seemingly, Mr. McEnerney, much less actually, dictate how this case should be presented. I simply want to avoid unnecessary controversies here if such is possible. Now, frankly, and categorically, are you, gentlemen, here to try this case now upon its merits?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—Yes.

The COURT.—With the expectation that it shall be tried on the merits to-day and everything decided?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—Yes.

The COURT.—Why not do that?

Mr. McENERNEY.—I am willing to go on.

The COURT.—All right, let us go about it.

Counsel then agreed that there should be introduced three depositions, and no more; (a) the deposition of Mr. Benjamin Schneewind, on behalf of the plaintiff; (b) the deposition of Mrs. Annette Adams, formerly United States Attorney for [122] the Northern District of California, introduced on behalf of the defendant California and Hawaiian Sugar Refining Company; and (c) the deposition of Mr. J. G. Weatherly, attached to the Department of Justice, at Washington, D. C., to be introduced on behalf of complainant in rebuttal. Thereupon the Court suggested that it would read these depositions during the noon recess, to which counsel agreed, whereupon the morning session was closed

and a recess taken until 2 P. M. The Court reconvened for the afternoon session of December 27, 1920, at 2 P. M., whereupon the following occurred:

The COURT.—I have read the depositions, gentlemen.

The Plaintiff's Exhibits Numbers 1 and 2, respectively, were offered and received and are as follows:

Plaintiff's Exhibit No. 1.

COPY.

APPLICATION AND GUARANTY.

COMMERCIAL LETTER OF CREDIT No. —

Chicago, Ill., June 1, 1920.

Great Lakes Trust Company,

110 So. Dearborn St.,

Chicago, Illinois.

Gentlemen:

Please open by mail a confirmed credit for an amount not to exceed \$255,800 (two hundred fifty-five thousand eight hundred dollars) in favor of California & Hawaiian Sugar Refining Co., San Francisco,

For account of — ourselves.

Drafts(s) at — sight, on you.

Plain invoice(s) — yes.

Consular invoice(s) —.

Certificate(s) of weight —. [123]

Certificate(s) of inspection —.

Marine insurance covered by —.

War risk insurance covered by —.

Bill(s) of lading to order of shipper blank endorsed.
Covering refined sugar @ \$19.85 per 100# f. o. b.
San Francisco.

99% test 25 Dutch Standard.

to be shipped from San Francisco to Chicago.
Shipment from Java September and/or October.

Credit to remain in force until Dec. 31, 1920, at
San Francisco.

In consideration of your issuing the above said
credit I hereby guarantee unconditionally the pay-
we

ment of all drafts drawn under and in compliance
with the terms of the credit.

You are to receive a commission of $\frac{1}{4}\%$ together
with all expenses incurred by you in connection with
the arrangement of the credit and execution thereof.
At least — day prior to maturity of any draft or
drafts, the undersigned is to place you in Chicago
funds sufficient to pay each acceptance, with in-
terest, if any, and all charges relating thereto.

It is understood that neither you nor your agents
here or abroad, will be responsible for the validity,
correctness and/or genuineness of the documents
purporting to relate to aforesaid credit, nor for the
quality, quantity, and/or arrival of the merchandise
described in such documents.

It is further understood that if a confirmed credit
is ordered the credit may not be cancelled during
its life without the consent of all parties concerned.

Yours very truly,

CONTINENTAL CANDY CORPORATION,

(Signed) BENJAMIN SCHNEEWIND,

President. [124]

Plaintiff's Exhibit No. 2.

“B

Chicago, June 2, 1920.

“To The First National Bank of Chicago,
Gentlemen:

Having received from you the letter of credit on our account of which the annexed is a copy, for \$300,000.00 U. S. Currency, the undersigned hereby agree to its terms, and in consideration thereof, agree to pay you the amount of each acceptance under it, at maturity, in cash, or prior thereto, if you request it, and it is understood by the undersigned that the commission for accepting under this credit is to be $\frac{1}{8}$ per cent on drafts at sight, plus any charge for confirmation.

The undersigned also agree to pay you the amount of any revenue stamps which you may be required to attach to any acceptances drawn hereunder.

The undersigned hereby give you a specific claim and lien on all goods or merchandise (and the proceeds thereof) for which you may have paid or come under any engagements under this credit, and on all policies of insurance (which the undersigned agree to effect) on such goods or merchandise to an amount sufficient to cover your advances or engagements under this credit and on all bills of lading given for same, with full power and authority to take possession and dispose of the same at discretion, at either public or private sale, with or without notice, for your security and reimbursement and to charge all expenses including commission for sale and guarantee. And at any auction or public sale

by you hereunder you may bid and purchase as freely as third parties. And the undersigned further agree to give you any additional security that may be demanded. And the undersigned further pledge to you as security for any other [125] liability or liabilities of the undersigned to you, due, or to become due, or that may be hereafter contracted or existing, howsoever acquired by you, any surplus that may remain, either in goods or the proceeds thereof after providing for the acceptances under this credit. We further authorize you to cancel this letter of Credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user; and in case you feel insecure or unsafe at any time, any indebtedness due from you to us may be appropriated and applied hereon as well before as after the maturity of any acceptance then outstanding on account of said Letter of Credit.

Neither you nor your correspondents in — shall be responsible for any loss arising from any difference in quality or character of merchandise imported under this credit from that stipulated and expressed in the invoice accompanying the drafts, nor for correctness or genuineness of documents, nor for delay or deviation from instructions in regard to shipment.

This obligation is to continue in force and to be applicable to all transactions, notwithstanding any change in the individuals composing the respective firm parties to this contract, or either of them, or in that of the user of this credit, whether such

change shall arise from the accession of one or more new partners, or from the death or secession of any partner or partners.

Very respectfully,

CONTINENTAL CANDY CORPORATION.

BENJ. SCHNEEWIND,

President.

Recd. June 5. [126]

Mr. McENERNEY.—If your Honor please, the answer contains what would be, if numbered, the tenth defense. It is the last allegation. It is in the nature of a counterclaim. Counsel for the First National Bank thought that might be construed to be a counterclaim against them, and that in that event they would wish to answer; I wish to state now that it is not so designed, and that there is no occasion for them to join issue. And with that assurance they can treat the thing as I have stated it here to be.

Mr. PARTRIDGE.—If it is a true counterclaim, it requires no answer from us, but it may be treated as a cross-bill or a cross-complaint, and if so, Mr. McEnerney, perhaps you would be willing to stipulate that the allegations are deemed denied by us, so that the case may be fully at issue?

Mr. McENERNEY.—Yes.

Mr. PARTRIDGE.—We subpoenaed the secretary of the company, Mr. McBryde; we would like to call him.

Testimony of Warren M. McBryde, for Complainant.

WARREN M. McBRYDE, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

I am secretary of the California & Hawaiian Sugar Refining Company. The business of said company is refining cane sugar, and it has a factory located at Crockett, Contra Costa County, California. The term refining cane sugar means the conversion of raw sugar into commercial refined sugar. The company has a process in some cases known as tolling sugar, and the general acceptance of said term is that the raw sugar is put into the refinery and so much refined taken out. It is a process, by the use of bone coal, of purifying the sugar. Bone coal is a calcined animal charcoal. I am not certain whether [127] any Java sugars were ever put through that process. Mr. Rolph, our General Manager, would know about this. In general, the business of the corporation is that of refining any raw sugar, the majority of which is the Hawaiian sugar.

I have produced other contracts that our company has made for Java sugar this year. I cannot say how many of them are for the sale of Java White Sugar.

Q. Have you summed them up?

The COURT.—Are those some of them?

A. Yes.

(Testimony of Warren M. McBryde.)

The COURT.—Say 50 or 100, and let it go at that?

Mr. PARTRIDGE.—Do they all contain the provision known as paragraph 6 in the contract you made with the Continental Candy Company?

A. I am not familiar with that.

Q. Have you examined them to determine that?

A. No.

Mr. McENERNEY.—We will have that information given to you.

Testimony of Andrew A. Brown, for Complainant.

ANDREW A. BROWN, called in behalf of the complainant, after being duly sworn, testified as follows:

I am the Sales Manager of the California & Hawaiian Sugar Refining Company and am familiar with the contracts that were made this year with regard to the sale of Java Whites. All of the contracts contained the clause 6, providing against a resale, to the best of my knowledge and belief. I have not examined all of these contracts, but I have had them all before me as the sales were made, and there is only one form issued. The contracts for sugars refined by our company did not contain that clause. That clause was confined entirely to the specific 10,000 tons of Java Sugar sold at this one price.

Q. Did your company this year import any Java sugars, excepting [128] this 10,000 tons you speak about? A. We bought some.

(Testimony of Andrew A. Brown.)

Q. You bought it where?

A. We bought it here, through agents representing Java owners.

Q. And was it brought in consigned to you?

A. Brought in by steamers; it was consigned to agents here.

Mr. McENERNEY.—Q. They arrived here, though? A. They arrived here.

Mr. PARTRIDGE.—Q. How much Java white sugar did you buy this year?

A. We bought altogether, if my memory serves me correctly, a little in excess of 11,000 tons white and 6000 short tons of raw Java.

Q. Did you sell all of that throughout the market?

A. No, we refined the balance of the white, and we refined the raw.

Q. That is, the other thousand tons of the white you refined, and then you sold that under contracts which did not contain this restriction, did you?

A. As I stated before that covered the specific 10,000 tons, the sugar which we sold, Java White.

Q. And none other?

A. Our first purchase of Java White in the entire matter covers that 10,000 tons. We did not buy any Java White during the year 1919. There has been no Java White Sugar, or any other Java sugar, come into this country for years, although I think we bought a cargo in 1911.

Our refined product is distributed from the Chicago and St. Louis line West. We have de-

(Testimony of Andrew A. Brown.)

clined tolling Java sugars for other people at times for various reasons, but have tolled for the United States Government quite heavily this year. I think we tolled for outsiders in small lots, for various people who were in distress, roughly, 1000 tons during the year. As a [129] policy, we did not care to toll for outsiders, although we had no fixed rule.

On May 14th of this year our price for refined sugar was 22.75; the same on the 18th. We sold this Java at 19.85.

Q. I would like to have you explain just how you bought the 10,000 tons. May I ask, first, the sugar involved in this case is a part of that 10,000 tons, isn't it? A, Yes, sir.

Q. Just how did you buy that, and what was the process by which you got it?

A. Due to strikes in the Hawaiian Islands, and the general scarcity of sugar, we felt that we needed more sugar, and we went into the market and bought. I made inquiries from various firms; one firm gave me a price and we bought and closed for the sugar. It developed that the sale was through London.

Q. Did you buy from the Java refiner?

A. There is no Java refiner. The sugar that comes from Java is a washed sugar, known as Java Whites. They don't run through the bone coal process. It is not considered refined sugar. I bought this sugar through Otis, McAllister & Co., commission merchants of San Francisco, and entered into a contract directly with Otis, Mc-

(Testimony of Andrew A. Brown.)

Allister & Co. I bought it specifically, 3000 tons from Java in August, 3000 in September, and 4000 in October, and under the terms of the contract it was our option to have it delivered either at San Francisco or Crockett. It was brought here on the Java-Pacific Line. I bought it C. I. F. San Francisco, and the freighting was up to the sellers.

Mr. McENERNEY.—It was sold C. I. F.—cost, insurance and freight from the seller; he put it on board and paid the freight.

Q. Is that it? A. Yes, sir. [130]

Cross-examination.

Java White in its nature is not similar to sugar used in households in this country.

Q. (By Mr. McENERNEY). In what does the difference consist?

A. In its general large grain and appearance. There has been no trial of it in households because it has not been shipped to this country for a great many years until this year. It is made from cane and is a wash process, primarily made for the East Indian market, because the East Indian will not use refined sugar, the ox being a sacred animal, they will not touch it. During the period of shortage it was diverted all over the world. It has the same percentage of sugar as refined, though not quite as white in color; the grain is larger and much coarser, and not pleasing to the eye, such as the American housewife wants. Java White sugar is primarily for the Indian market, or direct con-

(Testimony of Andrew A. Brown.)

sumption in certain countries which have been using it for years, such as the Levantine nations and England for manufacture. It is suitable for manufacturing purposes such as canned fruits, outside of very white juice fruit, such as Bartlett pears; for peaches or for apricots, or for anything of that nature, having an ordinary dark juice, it would serve the purpose.

In respect to the 10,000 tons which I have mentioned, all the contracts coming under my eye in the course of business, contained clause 6, as we only had one form of contract in respect to that particular 10,000 tons. The reason for putting that clause into contracts covering the sales of Java Whites and not in the sales of our refined sugar was that early in the year there was apparently a great shortage of sugar; the Government so voiced it. They had a strike in the Hawaiian Islands, sugar was not coming promptly. We bought sugar to aid our customers [131] to have sufficient supplies. The Government was very active. The Department of Justice acting as the Food Control, was very watchful and they came to see us constantly, the supplies, and to see that we distributed them properly, that we did not allow them to go to unusual channels. We tried to distribute it fairly. They looked at our margins. A man came around every time we had a block of sugar and saw the number of tons we received, and asked us when we were going to distribute another block. We allocated our sugars then on past performance. We

(Testimony of Andrew A. Brown.)

tried to distribute it fairly. Instead of allowing a man to select the quantity he wanted, we distributed it on past performance over the country in which we formerly did business. The man that I refer to who came around was Mr. Montgomery, from the Department of Justice; he was one of the investigators; he was in the office a great many times during the first six months in the year; I should say offhand, he was there a couple of times a week; sometimes a little oftener; sometimes a little less. He followed up everything and he knew all of our intake and outgo. We sold the 10,000 tons of Java Whites to manufacturers and no one else, although others than manufacturers applied for the purchase of Java Whites, such as wholesale grocers in the Middle West. Under instructions from the Department of Justice we refused to sell these 10,000 tons, or any part of it, and we wired our agent, declining to sell. Mr. Montgomery informed me about the orders coming from his superior in the Department of Justice, Mrs. Annette Adams. We refused to sell Java White Sugar to wholesale grocers in the Middle West because we were instructed to confine the sale of Java Whites to manufacturers, in order to release a larger amount of our regular refined to the consuming public. Pursuing this course, it [132] would enlarge the quantity of sugar available in the household to the extent that the manufacturer could not call on me for my refined sugar. Not only through the directions of the Government, but as a sugar

(Testimony of Andrew A. Brown.)

man, I knew that that would be the effect. By selling to manufacturers, and by forbidding them to resell, we sought to bring about the use of Java Whites by them which the householder would not take, owing to its forbidding aspect.

Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?

Mr. PARTRIDGE.—I object to that, if your Honor please, on the ground that the motive is of no consideration in this contract.

Mr. McENERNEY.—It enters into it.

The COURT.—This is a case where the considerations one way or the other might be equally balanced and motive might have a very determining effect, if that should be the case. Objection overruled.

(EXCEPTION No. 1.)

A. As far as I know, it was merely trying to follow out the rules of the Department of Justice.

Statistics show that a total consumption of sugar for household use annually in this country varies, roughly, and it is estimated at 80 pounds per capita, including direct consumption and manufacture, and in tons would be, roughly, $4\frac{1}{2}$ million long tons. Statisticians keep all their statistical figures in long tons, but we usually speak of tons as short tons. I can not give in round numbers, the number of tons used for household consumption, and the number of tons used for manufacturing; there is a book called Bernard's book, or Bernardi, or some [133] such

(Testimony of Andrew A. Brown.)

name as that, which gives the figures. It gives 4,098,000 tons for the year 1919. We were under direct absolute control then. My recollection is that the proportion of sugar used by households and manufacturing is $\frac{5}{8}$ for household and $\frac{3}{8}$ for manufacturing.

I have a memorandum of the prices of refined sugar, for the year 1920, including the dates May 14th, and May 18th, 1920, when we sold Java White to the Continental Candy Corporation. These figures are as follows:

Date	Number of Allotment.	Cents.
January 13	1st	15
January 15	2d	15
February 14	3d	15
February 17	4th	15
March 1	5th	14
March 15	6th	14
April 23	7th	20½
May 5	8th	22 75
May 10	9th	22 75
May 29	10th	26 30
June 10	11th	25
June 21	12th	23½
June 23	13th	23
June 29	14th	22 75
July 1	15th	22 25
July 14	16th	21 75
August 5	17th	20
August 30	18th	17
September 13	19th	15

(Testimony of Andrew A. Brown.)

Date	Number of Allotment.	Cents
September 27	20th	14 $\frac{1}{4}$
September 28	21st	14
October 5	22d	12 $\frac{1}{2}$
October 6	23d	12
October 14	24th	11
October 21	25th	12
November 3	26th	11
November 10	27th	10 $\frac{1}{2}$
November 16	28th	10
November 18	29th	9 $\frac{1}{2}$
November 23	30th	9
December 14	31st	8 $\frac{1}{2}$
December 17	32d	8

The above figures are for our refined sugars and we have no quotations for Java Whites throughout that period. All sugars, including Java Whites, raw, refined and washed sugar, [134] fell in the same ratio. In making allotments of sugar we took a block of sugar, as the raws arrived, and in the refined form we allotted it all over the sections of the country where we did business, on the basis of past performance of the people to whom we allotted it, based on their past purchases; that is, such a percentage of what we had on hand as would be equal to the percentage of ratio which was established amongst them in the history of their purchases from us.

Tolling is where a man has some raw sugar, or semi-raw sugar, that he wishes converted into refined. He tenders it to us and asks us what we will charge for refining it.

(Testimony of Andrew A. Brown.)

The COURT.—Just like taking a little corn to the mill and getting some corn meal back; is that it?

A. Yes, excepting one thing, and that is the amount you get back depends on the test of the original sugar that was offered by you. We take a certain portion as payment for the refining. We tried to confine our tolling, due to the large amount of our own sugar, strictly to the Government, which imported on transports for the use of the Army, large blocks of sugar. I think we tolled something like 12,000 or 14,000 tons for the Army.

Q. Do you toll any of the Hawaiian sugar?

A. No.

Q. And outside of for the Government it is a very negligible item in your business, is it?

A. We have not tolled this year, because circumstances were not such that they asked anybody to toll. To my knowledge this year is the first time we have tolled for anyone outside of the Government. I think we have tolled for them before.

I am familiar with clause 7 which appears in the contracts of May 14th and May 18th, 1920. In taking this sugar for their requirements, they could not call on us for any more of our own sugar. That was supposed to be their quota, as far [135] as we were concerned, from the time we delivered it, for the rest of the year. The allotments were a kind of a prior matter, in one sense, although at the time we did this, we were acting under orders, you might say, of the Department of Justice.

(Testimony of Andrew A. Brown.)

Clause 7 was introduced by the direction of the Government. On May 14th and May 18th, 1920, and ever since, there were about 18 or 20 refiners in the business of refining and selling refined sugars and raw cane in this country.

Q. As I understand it, neither clause 6 nor clause 7 was in the contract whereby you sold your own refined sugar? A. No, sir.

Q. But they were introduced into this 10,000 ton lot? A. Yes, sir.

Q. And you refined the extra thousand tons of Java White which you obtained, did you?

A. Yes, sir.

Q. So that never came into a Java White contract? A. No, sir.

Redirect Examination.

To my knowledge, Java Whites were not bought by the wholesalers and retail trade for domestic and restaurant consumption. I do not know whether or not the chain of restaurants known as Childs used that sugar on their tables.

Q. (By Mr. PARTRIDGE.) Now, in regard to this clause 7, in regard to the quota, you made two contracts with the Continental Candy Company, didn't you? A. Yes, sir.

Q. The first one was for how many tons?

A. 750.

Q. And you inserted in there that that was to be their quota, didn't you? A. Yes, sir.

(Testimony of Andrew A. Brown.)

Q. And then you took another contract with them for 500 tons? A. Yes, sir.

Q. That was to be another quota, was it?

A. It was so understood. [136]

Mr. McENERNEY.—The trouble with that is that the contract says it is their quota from the date of delivery to the end of the year. They haven't got it yet. And if the railroad doesn't speed up they won't get it.

Mr. PARTRIDGE.—I was wondering why there were two quotas ordered to be put in there by the Government.

Mr. McENERNEY.—Because they had the stereotype form of contract; that is all.

Mr. PARTRIDGE.—Q. In other words, Mr. Brown, you took contracts for as much sugar as people wanted, didn't you. A. No, sir.

Q. Why did you make that second contract for the additional 500 tons?

A. Because they wanted more sugar in one month than they could get; they wanted more September sugar than the 250 tons which they got in September, and they couldn't get it, and then they took later sugars—October.

Q. When you made the first contract with them, on May 14th, did you, under direction of the Government, determine that that was to be their quota for the year?

A. There was another trade still hanging in abeyance. We had a little sugar left that was not sold, and we passed it out to people in that form,

(Testimony of Andrew A. Brown.)

in the form of Java Whites. The records will show if those were the last contracts made on the 10,000 tons. There were some remnants, which caused the second contract, by reason of the fact that in different sections, a certain quota to Kansas City, some to Omaha, and some to Chicago, didn't take the full amount of their quota, and it was allowed to go to other sections. I cannot say at this minute that the second contract was for sugar we had left over after we had made contracts for the entire 10,000 tons.

Q. Are you sure that you made no contracts for Java sugar [137] with anybody besides actual manufacturers? A. Yes, sir.

Q. No wholesale grocers? A. Absolutely none.

Q. And nobody in the trade except those that were going to use it?

A. Except those that were going to use it.

Q. Did you make any contracts with canners?

A. Not for any of this sugar.

Q. Were they all candy manufacturers?

A. There were no canners.

Q. That doesn't quite answer my question. Were they all candy manufacturers?

A. I don't want to make a misstatement, but as near as I can remember, Candy manufacturers—there may have been some large wholesale bakers. The National Biscuit Company, if I remember right, took some. The Corn Products Company took some.

Q. Those contracts are all here, aren't they?

(Testimony of Andrew A. Brown.)

A. Yes.

Q. Supposing you take a look at them and see.

The COURT.—Wait. That might be interesting, but how is it material, Mr. Partridge?

A. There was none sold for direct consumption, your Honor.

Mr. PARTRIDGE.—I assumed that the witness' testimony in regard to the nonuse of this sugar by household or restaurant consumers was based on the proposition that it was not fit for that. I was wondering whether or not any of these sugars were put out with the expectation that they were to be used for those purposes.

Mr. McENERNEY.—Well, we can look at that later, Mr. Partridge. If you are through with Mr. Brown now, he can run over the contracts and tell you.

A. (Continuing.) I recall two; the National Biscuit Company. I don't know whether they make candy in connection with [138] their business, and also the Corn Products Company, which makes syrup; none of it was sold for direct consumption, or to groceries, I can assure you of that.

Clause 6 was put in to the contract on the verbal say-so of Mr. Montgomery, and also the Fair Trade Commission, who were working in conjunction with Mr. Montgomery's superior, Mrs. Annette Adams. The Fair Trade Commission was formed under the Department of Justice. H. Clay Miller was the chairman.

(Testimony of Andrew A. Brown.)

Q. Did he come down and tell you that in all the Java sugars you must put in the clause that it should not be resold under any circumstances?

A. He told me that they passed on the thing. Mr. Montgomery came to the office and told me distinctly that, as I remember; whether Mr. Miller told me over the phone or in person, I don't remember, but he did so tell me. Mr. Montgomery and Mr. Miller told me that I must put in a clause that it was not for resale. Mr. Montgomery told us that Mrs. Annette Adams wished us to sell this sugar to manufacturers only, and that they had to use it in their own manufacturing, and not to resell for profit; it could not be passed on; that we had to put that in our contract. Furthermore, in supplying them with this amount of sugar, they could not call on us for any further refined sugar.

Mr. PARTRIDGE.—Q. Did either of these gentlemen tell you to put that clause in the contract for the sale of your own refined sugar?

A. That had not come up, and never did come up.

The COURT.—Did they say anything about it?

A. No.

The COURT.—Well, all right, just be specific.

Mr. PARTRIDGE.—Q. There was no discussion then, in regard to restricting the sale of your own refined sugars at [139] all?

A. There was restriction, that we had to spread it out, do the right thing, allocate it.

Q. I mean in regard to the question of resale.

A. No, sir.

(Testimony of Andrew A. Brown.)

Q. Did you sell any refined sugar to confectioners, or candy makers, or bakers, or canners?

A. Some.

Recross-examination.

Milton H. Esberg, John A. Britton, John R. Hanify, R. B. Hale, E. S. Heller, Mrs. Aaron Sloss, and Mrs. Helen M. Knight, are the names of some of the members of the Fair Trade Commission. The only person I saw was H. Clay Miller, the chairman.

We first came under Government surveillance in the matter of rationing sugar and the sale of sugar shortly after August 1st, 1917; I cannot give you the dates. They are all a public record and history. We were dealing in these matters under Government supervision from 1917 down into 1920, and past these two contracts. We kept informed as to the regulations which were being put forward in the matter by the Government and were familiar with them from time to time as they came out. Mr. George Rolph was and now is the General Manager of our Company. He became the head of the Sugar Administration under Mr. Hoover, at Washington, D. C., but resigned from the Company during that time, and was in Washington about three years.

Further Redirect Examination.

Previous to these contracts, the Continental Candy Company bought refined sugar from us. I know they bought some in 1919. I knew their quota because they succeeded the Novelty Candy

(Testimony of Andrew A. Brown.)

Company, some time early in 1919. The Novelty Candy Company had been a purchaser from us before that time. I do not [140] know whether the Candy Company bought all their sugar from us, and I do not have any idea how much they needed for their business in 1920.

Further Recross-examination.

(Defendants' Exhibit "A"—a telegram—was offered and received in evidence, dated May 5th, and marked Defendants' Exhibit "A.") Said exhibit was introduced by defendant California and Hawaiian Sugar Refining Company, and read as follows: [141]

Defendants' Exhibit "A."

(POSTAL TELEGRAM.)

San Francisco, May 5, 1920.

Henry Flarsheim,

Care Seavey & Flarsheim Brokerage Company,
Kansas City, Mo.

We have permission from the local authorities to sell the Java Whites with following restrictions First Sale to manufacturers only for their own manufacturing needs and under no circumstances are they to resell Second Sales of this sugar to manufacturers to constitute their quota of sugar from us from delivery date of Java Whites until end of year Stop With above ruling it will be in order that you confirm if sales are still open to your confirmation St. Louis office National Candy one thousand tons August five hundred tons each

September October Blanke Wenneker One hundred tons each August September October Busy Bee Candy Forty tons each August September October Best Clymer One hundred tons each August September October All shipment from Java in the months named nineteen eighty five net landed weights fob cars San Francisco Letters of credit covering Stop Under ruling must decline Kohl Grocer Quincy three hundred tons Stop Regarding Chicago Corn Products one thousand tons could make August shipment from Java which would readily arrive Chicago long before end October unless railway strike prevented Confirm if for use in Chicago territory only and in no event for shipment to Eastern plants Stop In line our letter April twenty third sale these sugars to manufacturers is expected to release later an equal amount of our output to jobbers Stop You have ample time to sell balance but naturally do not wish to miss sales to manufacturers who may replace elsewhere Leave disposition balance in your hands.

CALIFORNIA AND HAWAIIAN
SUGAR REFINING CO. [142]

(The document is handed to witness.)

That was a telegram sent by the California & Hawaiian Sugar Refining Co. to Mr. Henry Flarsheim, of the Seavey & Flarsheim brokerage company, to whom we look for the general conduct of the sale of our sugar in the River Section, and through whom the 1250 tons of sugar were sold to the Continental Candy Corporation. Their Chi-

(Testimony of Andrew A. Brown.)

cago Manager, Mr. George J. Tennison, is the particular man in that concern who dealt with the Continental Candy Company, and is here in court. Our company melted a little in excess of 400,000 short tons this year.

The COURT.—Q. You gave a resume of the process in 1920; I detected roughly, a rise during the first six months and a fall during the succeeding six months. What, generally, was the cause of that fluctuation?

A. All sugar people believed there was going to be a big shortage, it looked very much like it, especially early in April, when disquieting news came as to the condition of the Cuban crop; the market for raw sugar became very much excited; people plunged and bought everywhere all over the world for the United States. Suddenly we woke up to find that instead of a shortage in this country we had swapped our good dollars for the sugar of all nations, and that they had tightened their belt line and let us have their sugar for our money; then the market began to sag, and it sagged very quickly.

Q. When was that discovery made?

A. It came upon us like a guillotine, in the middle of July.

Q. And immediately thereafter prices began to drop?

A. Yes, and instead of having a shortage we found we had a heavy carry-over, especially of domestic beet sugar in this country.

(Testimony of Andrew A. Brown.)

In addition to the 18 or 20 refineries operating May 14th and May 18th, 1920, there were on those dates and since, [143] down to the present time, about 100 factories manufacturing beet sugar. The output of the 18 or 20 refineries is about three and three-quarter million long tons, and of the 100 beet manufacturers, about a million short tons this year.

I received a letter on September 2d, 1920, from the Continental Candy Corporation, which was forwarded to us from our Chicago house.

This letter was offered and received in evidence by the defendant Sugar Refining Company, and was in the words and figures following:

“Gentlemen: When your Mr. Flarsheim called on us some time ago, and very kindly offered to ship us C. & H. Sugars in place of Javas we had purchased, we thought at that time that we could have these sugars shipped as soon as possible if your company could do so, figuring that part of this could be used in our Jersey City and New York plant. Since that time, conditions beyond our control have developed so it will be impossible for us to pay for these sugars. Therefore, we would like to have you ship the September contract in November; October in December, at which time we think we will be in position to take care of them.

“The reason we are forced to do this is as follows: We contracted for a large amount of sugars to be shipped in April, May, June, July, August and September; but on account of the strike in Cuba and the scarcity of sugars early this year,

(Testimony of Andrew A. Brown.)

our shipments were not made on the dates specified; in fact, were delayed about six weeks; April shipments not arriving here until June, and the other shipping period delayed accordingly. In August, however, since Mr. Flarsheim was here, we have had twenty-five thousand bags of sugar shipped to us, and in order [144] to take care of this we had to borrow to the limit of our ability. If financial conditions were normal, we would have been able to take care of this contract, but you know what the financial situation is.

“Trusting that you can see our position in the matter, and appreciating your generosity in being willing to ship C. & H. instead of Javas, we are,

“Yours very truly,

“CONTINENTAL CANDY CORPORATION,

“BENJAMIN SCHNEEWIND,

“President.”

(It was on the letter-head of the Continental Candy Corporation, dated Chicago, September 2, 1920, addressed to the Seavey & Flarsheim Brokerage Company, 326 West Madison Street, Chicago.)

Q. When did you first hear from them in repudiation of their contract?

A. Within a comparatively recent period. I would say somewhere around October.

Q. Was it October or November?

A. It might have been the first of November, right around there.

Mr. PARTRIDGE.—That is alleged in the bill, Mr. McEnerney, and not denied, that date, I think.

Mr. McENERNEY.—Very well.

Mr. McEnerney here offered in evidence a certified copy of a letter by Howard Figg, Esq., Special Assistant to the Attorney General, written to the American Sugar Refining Company, April 29, 1920. This letter is set forth in the answer of the California & Hawaiian Sugar Refining Company, and is as follows:

“DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.

April 29, 1920.

The American Sugar Refining Company,
New York City.

Gentlemen:

It was very clearly established at the conference held by me with representatives of the various eastern sugar refiners on April 26, that speculation and resales within the trade were very largely responsible for present unequal distribution and exorbitant prices. The refiner can very definitely help in relieving this situation by circularizing his trade to the effect that he will distribute to regular customers only, and will refuse to accept any export and toll business except where contracts are now in existence; and he would feel justified in excluding from participation in future allotments any customer who is believed to have sold to speculative buyers.

I shall insist upon a strict enforcement of Rule 6, of the Special License Regulations, which pro-

hibits resales within the trade. I herewith quote for your information, as well as for that of your trade, this Rule:

‘Resales within same trade prohibited, when
—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.’

I hope that you will give this matter your immediate consideration, sending me a copy of your letter to your regular customers.

Yours very truly,

(Signed) HOWARD FIGG,

Special Assistant to the Attorney General.”

Mr. PARTRIDGE.—We will object to this as immaterial, irrelevant and incompetent. It is a letter by a Special Assistant to the Attorney General to the American Sugar Refining [145] Company in New York, with regard to a certain Rule 6 of the Food Administration, in which he states that he would insist upon a strict enforcement of Rule 6, which Rule 6 does not even cover the prohibition in the contract here.

The COURT.—Then you won’t be hurt any.

Mr. PARTRIDGE.—I don’t know as we will be hurt, but it is entirely immaterial.

The COURT.—Overruled. I suppose you are going to show your authorization?

Mr. McENERNEY.—Yes.

(EXCEPTION No. 2.)

Prior to May 14th, 1920, I became aware of the nature of a letter addressed by Mr. Figg, of the Attorney General's office, to the American Sugar Refining Company, dated April 29, 1920, against resale within the same trade. This became disseminated among all sugar people; it was published in all sugar journals before May 14th, 1920.

Mr. McENERNEY.—I desire to offer in evidence a certified copy of the Rules and Regulations governing the sale of sugar, and the licensing of persons. What was the date of your license?

Mr. FOX.—The application was made June 30, 1920; the license was issued on September 9, 1920.

Mr. McENERNEY.—Then in the year 1920 up to June 30, 1920, you had no application pending for a license and none was in existence?

Mr. FOX.—We sold only small lots of sugar at that time.

Mr. McENERNEY.—But you had no license for selling sugar in that period, and had not applied for a license: That [146] is right, is it?

Mr. FOX.—Yes.

Mr. McENERNEY.—We will take that as an admission.

A certified copy of the Rules and Regulations governing the sale of sugar and the licensing of persons was here offered in evidence by the de-

fendant Sugar Refining Company, and marked Defendant's Exhibit "C," which read as follows:
[147]

Defendants' Exhibit "C."

I.

A. GENERAL REGULATIONS.

The following general rules correspond to General Rules, Series B, which become effective, unless otherwise noted, on November 1, 1917.

RULE I. REPORTS TO BE FURNISHED.—

It shall be the duty of each licensee to give to such representative as may be designated by the United States Food Administrator, whenever the said representative shall so require, and information concerning the conditions and management of the business of the licensee. Reports, when requested by said representative, shall be made on such blanks, to be furnished by the United States Food Administration, as the United States Food Administrator may designate, giving complete information regarding transactions in any commodities, imported, manufactured, refined, packed, purchased, contracted for, received, sold, stored, shipped or otherwise handled, distributed or dealt with by the licensee, or on hand, in the possession or under the control of the licensee, and any other information concerning the business of the licensee that such representative may require from time to time. Whenever the said representative shall require it, the licensee shall furnish such information on writing under oath.

RULE 2. PROPERTY AND RECORDS TO BE OPEN TO INSPECTION.—The authorized representative of the United States Food Administrator shall be at full liberty, during ordinary business hours, to inspect any and all property stored or held in possession or under the control of the licensee, and all records of the licensee. All necessary facilities for such inspection shall be extended to the said representative by the licensee, its agents and servants.

RULE 3. MUST KEEP RECORDS.—The licensee shall keep such records of his business as shall make practicable the verification of all reports rendered to the United States Food Administration.

RULE 4. INFORMATION FURNISHED NOT TO BE DIVULGED.—No agent or employee of the United States Food Administration shall divulge or make known in any manner, while he is such agent or employee or thereafter, except to such other agents or employees of the United States Food Administration as may be required to have such knowledge in the regular course of their official duties, or except in so far as he may be directed by the United States Food Administrator or by a court of competent jurisdiction, any facts or information regarding the business of the licensee which may come to his knowledge through any examination or inspection of the business or accounts of the licensee or through any reports made by the licensee to the United States Food Administration.

RULE 5. UNREASONABLE PROFITS PROHIBITED.—The licensee shall not import, manufacture, store, distribute, sell, or otherwise handle any food commodities on an unjust, exorbitant, unreasonable, discriminatory, or unfair commission, profit, or storage charge. [148]

RULE 6. RESALES WITHIN SAME TRADE PROHIBITED, WHEN.—The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to results in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.

RULE 7. SPECULATION PROHIBITED.—No broker or other licensee shall buy or sell any food commodity for his own account unless he is also regularly engaged in, and holds himself out to the trade as conducting, the business or distributing such commodity otherwise than on a commission or brokerage basis, or unless he uses such commodities in manufacturing; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution.

RULE 8.—SALES TO SPECULATORS FORBIDDEN.—No licensee shall knowingly sell any food commodity to a broker or other licensee who is not buying for personal consumption or engaged in using such commodity in manufacturing, or who is not regularly engaged in, and holding himself out to the trade as conducting, the busi-

ness of distributing such commodity otherwise than on a commission or brokerage basis; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution.

RULE 10. UNFAIR PRACTICES FORBIDDEN.—The licensee shall not buy, contract for, sell, store or otherwise handle or deal in any food commodities for the purpose of unreasonably increasing the price or restricting the supply of such commodities, or of monopolizing, or attempting to monopolize, either locally or generally, any of such commodities.

RULE 11. MUST NOT COMMIT WASTE.—The licensee shall not knowingly commit waste, or wilfully permit preventable deterioration in connection with the production, importation, manufacture, storage, distribution or sale of any food commodities.

RULE 12. MUST REPORT CHANGE OF ADDRESS.—The licensee shall report within ten days in writing, to the United States Food Administration any change of address, or any change in the management or control of the person, firm, corporation or association licensed, or any change in the character of the business.

RULE 17. MUST NOT DEAL WITH PERSONS VIOLATING FOOD CONTROL ACT. The licensee shall not, except with the written consent of the United States Food Administrator, knowingly sell any food commodities to or buy any food commodities from any person who shall, after this regulation goes into effect, violate the pro-

visions of Sections, 4, 6, 8, or 9, of the Act of Congress approved August 10, 1917, making an unreasonable rate of charge therefor or otherwise selling, holding, or dealing wrongfully in or with such commodity.

NOTE.—This rule became effective November 1, 1917, and was amended to its present form January 28, 1918. [149]

RULE 19. MARKET QUOTATIONS MUST NOT BE MISLEADING.—The licensee shall not issue or make public, market quotations or make any statements to any person regarding the price at which food commodities are being sold, which quotations or statements cannot be verified either from his own records or from the records of other licensees, and shall not make any other misleading statements which tend to enhance the price of any food commodities.

RULE 20. DEFINITIONS OF TERMS IN RULES AND REGULATIONS.—The words used in these rules and regulations shall be construed to import the plural or the singular, as the case demands. The word “person,” whenever used in these rules and regulations, shall include individuals, partnerships, associations, and corporations. The word “food commodities,” whenever used in general or special rules and regulations, unless otherwise specified, shall include all commodities specified, by the President in any license proclamation already issued or which may thereafter be issued by him under the authority of section 5

of the act of Congress approved August 10, 1917, known as the Food-Control Act

Dealings on an exchange, board of trade, or similar institution shall include only such dealings as are made by public trading on the floor of the exchange under the supervision of the exchange, board of trade, or similar institution, in such ring, pit, or other similar place as may be especially reserved by the exchange, board of trade, or similar institution for public trading.

RULE 21. SPECIAL RULES PREVAIL OVER GENERAL RULES, WHEN.—Nothing contained in these general rules and regulations shall be construed as restricting, modifying or affecting in any manner the operation of any special rules and regulations which have already been promulgated or which may hereafter be promulgated, and whenever any special rule is inconsistent with a general rule, the special rule shall prevail.

RULE 22. LICENSE NUMBER MUST BE PLACED ON CERTAIN DOCUMENTS.—The licensee shall place on every contract, order, acceptance of order, invoice, price list, and quotation issued or signed by him relating to food commodities the words "United States Food Administration License Number," followed by the number of his license. No licensee shall knowingly buy any food commodities from or sell any such commodities to, or handle any such commodities for, any person required to have a license who has not secured such license and complied with the provisions of this trade.

UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE,

Washington, D. C., December 7, 1920. [150]

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of the original General Regulations, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice.)

A. MITCHELL PALMER,
Attorney General. [151]

A certified copy of a Proclamation of the President was offered and introduced in evidence by the defendant Sugar Refining Company, and marked Defendants' Exhibit "D," transferring to the Attorney General the powers and authority theretofore held by the Food Administrator, except those relating to wheat and wheat products, which are transferred to Julius H. Barnes; the document bearing the signature of the President of the United States, and dated November 21, 1919, and the same read as follows: [152]

Defendants' Exhibit "D."

(TRANSFERRING TO THE ATTORNEY GENERAL THE POWERS AND AUTHORITY HERETOFORE HELD BY THE FOOD ADMINISTRATOR EXCEPT THOSE RELATING TO WHEAT AND WHEAT PRODUCTS WHICH ARE TRANSFERRED TO JULIUS H. BARNES.)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas under the authority of an act of Congress entitled "an Act to provide further for the national security and defense by encouraging the production conserving the supply, and controlling the distribution of food products and fuel," there was created by Executive Order, dated August 10, 1917, a Governmental organization known as and called United States Food Administration, and

Whereas Herbert Hoover was appointed United States Food Administrator with power to supervise, direct and carry into effect the provisions of said Act and the powers and authority therein given to the President so far as the same apply to foods, feeds and their derivative products and to any and all practices performed and regulations authorized or required under the provisions of said Act, including the issuance, regulation and revocation in the name of said Food Administrator of licenses under said Act; and in this behalf to do and perform such acts and things as were author-

ized or required of him from time to time by direction of the President and under such rules and regulations as should be prescribed by the President from time to time, and

Whereas by Executive Order of November 16, 1918, Edgar Rickard was authorized and empowered during the absence of Herbert Hoover, United States Food Administrator, from the United States to exercise the powers and authority delegated to Herbert Hoover as United States Food Administrator, and

Whereas Herbert Hoover has resigned from the office of the United States Food Administrator and Edgar Rickard has exercised certain of the said powers and authority of the United States Food Administrator until this time, and

Whereas it is now desired to transfer the powers and authority of the United States Food Administrator in the manner and to the officers hereinafter designated.

Now therefore under and by virtue of the power conferred upon me by the provisions of said act of August 10, 1917, and of all other Acts giving me power of the premises, I, Woodrow Wilson, President of the United States, hereby order and direct as follows:

All acts done and authorized by Herbert Hoover, United States Food Administrator, as aforesaid, and by Edgar Rickard, acting for Herbert Hoover, United States Food Administrator, as aforesaid, are hereby authorized, approved, ratified, confirmed and adopted. [153]

The powers and authority heretofore vested in the United States Food Administrator, under the authority of said act of Congress approved August 10, 1917, and to the executive orders and proclamations issued thereunder, in so far as they apply to wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by Julius H. Barnes, Chief of the Cereal Division of the United States Food Administrator, who shall supervise, direct, and carry into effect the provisions of said act, and the powers and authority therein given to the President, so far as the same apply to wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provision of said Act, including the issuance, regulation, and revocation, in the name of said Julius H. Barnes, Chief of the Cereal Division of the United States Food Administration, of licenses under said Act relating to wheat and wheat products, and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time; and there is hereby transferred to said Julius H. Barnes, Chief of the Cereal Division of the said United States Food Administration, all remaining records of said United States Food Administration, and such of the remaining personnel and organization of said United States Food Administration, as he may determine to continue under him as Chief of the Cereal Division

of the United States Food Administration as aforesaid.

All licenses and revocations of licenses and all regulations now in force, so far as the same apply to wheat and wheat products, shall continue in force until altered or repealed by said Julius H. Barnes.

The powers and authority heretofore vested in the United States Food Administrator, under the authority of said Act of Congress approved August 10, 1917, and the executive orders and proclamations issued thereunder, in so far as they apply to foods, feeds and other derivative products, other than wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by the Attorney General of the United States, who shall supervise, direct, and carry into effect the provisions of said Act, and the powers of authority therein given to the President, so far as the same apply to foods, feeds and their derivative products, other than wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provisions of said Act, including the issuance regulation, and revocation, in the name of the Attorney General of the United States, of licenses under said act relating to foods, feeds and their derivative products other than wheat and wheat products, and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such

rules and regulations as may be prescribed by the President from time to time.

All licenses and revocations of licenses and all regulations now in force, so far as the same apply to foods, feeds and their derivative products other than wheat and wheat products, shall continue in force until altered or repealed by the Attorney General. [154]

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 21st day of November in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred Forty-Fourth.

(Seal)

WOODROW WILSON,

By the President.

UNITED STATES OF AMERICA.

DEPARTMENT OF JUSTICE.

Washington, D. C., December 11, 1920.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed is a true copy of a copy of ~~the original~~ of the President's Proclamation on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice)

THOMAS J. SPELLACY,

Ass't Attorney General. [155]

A certified copy of a letter of the Attorney General, Mr. T. W. Gregory, to the President of the United States, dated August 23, 1917, was introduced in evidence by the defendant Sugar Refining Company, and marked Defendants' Exhibit "E," and the same read as follows: [156]

Defendants' Exhibit "E."

187130-6

GCT-t

August 23, 1917.

Aug. 24, 1917.

Dear Mr. President:

I have considered the letter of Mr. Hoover, United States Food Administrator, dated the 22d instant, transmitted through you, in which he makes inquiry as to his powers in certain respects under the Food Control Act approved August 10, 1917. Among the enumerated purposes of this Act are these: To assure an adequate supply and equitable distribution of certain enumerated necessities, and to establish and maintain governmental control of such necessities during the war. (Section 1.)

In carrying out these purposes the President is authorized

to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, * * * to co-operate with any agency or person * * * (Section 2.)

Under this authority the President has created the office of United States Food Administrator.

The present inquiry in substance is whether

under this authority the Food Administrator by direction of the President may enter into agreements with persons in the various trades or industries within the scope of the Act which have the effect of fixing prices or of pooling output—in short, agreements which if made between private traders would violate the Sherman Anti-Trust Law. [157]

Since no specific agreement or arrangement is before me, I can only speak generally. I am of the opinion that any agreement made with producers or traders by the Government itself (through the Food Administrator acting by direction of the President), under authority of Section 2 of the Act, and having a reasonable relation to the objects enumerated in Section 1, for example, to assure an adequate supply and equitable distribution of necessities and to establish and maintain governmental control of necessities during the war, would not fall within the operation of the Sherman Anti-Trust Law, even though the effect of the agreement or agreements were to fix a uniform price or to accomplish a pooling of the output./ This, because governmental action with respect to prices or methods of distribution is obviously not within the mischief at which the Sherman Law was aimed. On the contrary, when natural laws of trade break down, the governmental action in this regard may become essential to prevent the private control of markets. For, when natural laws of trade can no longer be depended upon to regulate markets,

the only choice is between artificial control imposed by private interests and artificial control imposed by public agencies. In these circumstances, therefore, such governmental action, so far as running counter to the purpose of the Sherman Law, is directly in line with it.

I am equally clear that the President has no power under the Food Control Act to authorize price fixing or pooling agreements between the producers or traders themselves.

Sincerely yours,

T. W. GREGORY,
Attorney General.

The President,

The White House. [158]

UNITED STATES OF AMERICA.

DEPARTMENT OF JUSTICE.

Washington, D. C., December 13, 1920.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed letter is a true copy of the original on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Seal of the Department of Justice)

A. MITCHELL PALMER,
Attorney General. [159]

A certified copy of the application to the United States Food Administration by the Continental Candy Corporation, for a license to sell sugars, was offered in evidence.

Mr. FOX.—The actual application was an informal application of June 30, 1920.

Mr. McENERNEY.—I am offering now the formal application on a blank of the Food Administration, dated September 9, 1920.

The COURT.—That is the one that is referred to in the deposition, is it not?

Mr. McENERNEY.—I have not seen the deposition.

Mr. FOX.—Yes.

The document was admitted and marked Defendants' Exhibit "F" and the same read as follows: [160]

Defendants' Exhibit "F."

Form Bb 607

Return to

UNITED STATES FOOD ADMINISTRATION.

WASHINGTON, D. C.

LICENSE SECTION. 172382

.....

Sep 9, 1920

(Leave Blank.)

(Leave Blank)

Date.....

Place all your present Food Administration license numbers with their serial letters here:

.....

No. Card F. H.

.....

APPLICATION TO THE ATTORNEY GEN-
ERAL OF THE UNITED STATES FOR
LICENSE.

FOLLOW INSTRUCTIONS EXACTLY.
PLEASE USE TYPEWRITER OR PRINT
NAME AND ADDRESS PLAINLY.

1. Name under which business is conducted
CONTINENTAL CANDY CORPORA-
TION.
2. Corporation New York.....
(State whether applicant is an individual, cor-
poration, partnership or association. If a cor-
poration, state under what laws organized.)
3. Address—212 East Austin Avenue Chicago.
(Number and Street) (City or town)
Cook Illinois
(County) (State)
4. Name of owner if applicant is an individual.
5. Gross sales for calendar year 1918, approxi-
mately, \$3,702,324.14.

Hereby applies for license as Manufacturer or
Distributor (or both) of Foods and Feeds as indi-
cated on the following pages.

(BE SURE TO SIGN YOUR APPLICATION
ON PAGE 4)

JUL 13 1920

Referred 7/16/20

H

Approved see letter 9/7/20 from Mr. A. L. New-
ton. [161]

2.

Place check mark after each group and each

commodity or operation in each group that applies to your business.

1. Importer of Corn (), Oats (), Rye (),
Barley ()..... ()
2. Distributor of Corn (), Oats (), Rye (),
Barley ()..... ()
3. Importer of Sugar..... ()
4. Manufacturer of Sugar..... ()
5. Distributor of Sugar..... (✓)
6. Operator of Elevator Storing Corn (),
Oats (), Rye (), Barley ().... ()
7. Operator of Warehouse Storing Corn (),
Oats (), Rye (), Barley ().... ()

If you are engaged in distributing food or food commodities to the ultimate consumer only and the total gross receipts from the annual sales of such commodities amount to less than \$100,000, you are not subject to a U. S. Food Administration license and need not fill out and return this application.

3.

After checking your activities on page 2, please describe here your business in your own language as completely as possible: Manufacturers of Confectionery.

In the spaces provided below give the following information:

- (1) If a corporation, give names and addresses of corporate officers and their official titles. ✓
- (2) If a partnership, give names and addresses of the members of the partnership.
- (3) If an association, give names and addresses of officers or managing agents. [162]

If the business is conducted by an individual only, these spaces need not be filled in.

Name—Benjamin Schneewind, President.

Address—4142 Oakwald Ave., Chicago.

Name—William A. Millet, Vice-President.

Address—37 Wall St., New York City.

Name—George F. Lewis, Secretary.

Address—340 Claremont Ave., Jersey City,
New Jersey.

4.

On this page describe separately (use a separate section each time) all the places where you carry on business.

If the spaces provided for the listing of your places of business are insufficient, give the additional information on plain white paper, sign and return attached to this application.

A.

1. Location—340 Claremont Ave. Jersey City.
(Number and street) (Town) (County)
New Jersey.
(State)
2. Describe plant
(“Office,” “Elevator,” etc.)
3. Length of time in business at this point 10
years.....months.
4. Storage capacity (bushels).....(Applies only
to grain elevators or warehouses.)

B.

1. Location—337 East Illinois St. Cook.
(Number and street) (Town) (County)
Illinois.
(State)
2. Describe plant
("Office," "Elevator," etc.)
3. Length of time in business at this point.....
6 months
years.....months.
4. Storage capacity (bushels).....(Applies only
to grain elevators or warehouses.)

C.

1. Location
(Number and street) (Town) (County) (State)
2. Describe plant
("Office," "Elevator," etc.)

[163]

3. Length of time in business at this point.....
years.....months.
4. Storage capacity (bushels).....(Applies only
to grain elevators or warehouses.)

The statements and representations regarding the business of the applicant, as set forth in this application, are, to the best knowledge and belief of the applicant, true and correct.

(Do not use typewriter for signature.)

Sign here—CONTINENTAL CANDY CORPORATION.

By BENJAMIN SCHNEEWIND,
President.

Look over your application carefully before you return it.

BE SURE IT IS COMPLETE.

UNITED STATES GRAIN CORPORATION.

AGENCIES:

Baltimore

Buffalo

Chicago

Duluth

Galveston

Kansas City, Mo.

Minneapolis

New Orleans

New York City

Omaha

Philadelphia

Portland, Ore.

St. Louis

San Francisco

General Office

42 Broadway,

New York City.

18th & D Streets, N. W.

Washington, D. C.

In your reply refer to

December 7, 1920.

I hereby certify that the attached papers are a true and correct photostatic copy of the original application for license to the Attorney General of the United States for license of Continental Candy Corporation, a corporation of New York, address 212 East Austin Avenue, Chicago, Cook County, Illinois, the original of which is [164] on file in this office and in my custody.

(Seal of the United States Food Administration.)

JOHN G. DUDLEY,

Manager, Washington Office, United States Grain Corporation, Custodian of the Records of the United States Food Administration, Pursuant to Executive Order of the President, Dated August 21, 1920. [165]

Mr. McENERNEY.—We will offer a certified copy of a blank form of license issued and in use in the Department of Justice. That was in force September, 1920, and following, and was necessarily the one which the Candy Company obtained from the Department of Justice. The document was marked Defendants' Exhibit "G." Said exhibit read as follows: [166]

Defendants' Exhibit "G."

NOT TRANSFERABLE.

No. G.....

UNITED STATES OF AMERICA.

L I C E N S E.

LICENSE IS HEREBY GRANTED TO

.....
 of
 to engage in and carry on business in foods and
 feeds in accordance with the proclamations of the
 President and the regulations prescribed by him
 relating to such business, under an Act of Congress
 entitled "An Act to provide further for the national
 security and defense by encouraging the produc-
 tion, conserving the supply, and controlling the
 distribution of food products and fuel," approved
 August 10, 1917, or any amendments thereof.

This license is subject at any time to revocation,
 in whole or in part, or for a limited or unlimited
 period, for violation by the licensee, or by any
 officer, agent, or employee of the licensee, or any
 of the provisions of said Act or any amendment
 thereof, or of said regulations now or hereafter in
 force.

The licensee is required, whenever called upon by
 the Attorney General of the United States, or his
 representative, to furnish information and to make
 reports concerning his business in such detail as
 shall be prescribed, and shall keep such records of
 his business as shall facilitate the verification

[167] of information contained in said reports; and all property, books, records, and accounts of the licensee are at all times subject to the inspection of the Attorney General of the United States, or his duly accredited agent or representative.

This license is based upon the statements in licensee's application, on file with the United States Food Administration, Washington, D. C. All changes, such as change in firm or corporate name, new place of business, or changes in or additions to activities, must be reported immediately.

Dated.....

A. MITCHELL PALMER,

Attorney General of the United States.

Form Bb—0541.

UNITED STATES GRAIN CORPORATION.

AGENCIES:

Baltimore

Buffalo

Chicago

Duluth

Galveston

Kansas City, Mo

Minneapolis

New Orleans

New York City

Omaha

Philadelphia

Portland, Ore.

St. Louis

San Francisco

General Office

42 Broadway,

New York City.

18th & D Streets, N. W.

Washington, D. C.

In your reply refer to

December 7, 1920.

I hereby certify that the attached copy is a true [168] and correct photostatic copy of the license form in use on September 9, 1920, for issuance to licensees. I further certify that the original is on file in this office and in my custody.

(Seal of the United States Food Administration.)

JOHN E. DUDLEY,

Manager, Washington Office, United States Grain

Corporation, Custodian of the Records of the United States Food Administration, Pursuant to Executive Order of the President, Dated August 21, 1920. [169]

An uncertified copy of a Proclamation of the President of October 30, 1920, was offered in evidence by the defendant Sugar Refining Company, no objection being made to the introduction on the ground that it lacks certification. The said instrument was marked Exhibit "H" and read as follows: [170]

Defendants' Exhibit "H."

**CANCELING LICENSE OF CERTAIN FOOD
COMMODITIES.**

A PROCLAMATION.

WHEREAS, under and by virtue of an Act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel," approved by the President on the 10th day of August, 1917, it is provided among other things as follows:

"That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, fuel, including fuel oil and natural

gas, fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for actual production of foods, feeds, and fuel, hereafter in this act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act."

AND, WHEREAS, it is further provided in said act as follows:

"That, from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining or distribution of any necessities, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessities as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for systems of accounts and auditing of

accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation and the entry and inspection by the President's duly authorized agents of the places of business of licensees."

AND, WHEREAS, by virtue of the above provisions certain public announcements were made by the President from time to time as a result of which the importation, manufacture, storage and distribution of certain necessities were licensed.
[171]

AND WHEREAS, a changed situation has been brought about by the present armistice in the war between the United States and Germany, and by the approaching expiration of the powers granted to the President by an Act of Congress entitled "An Act to provide for the national welfare by continuing the United States Sugar Equalization Board until December 31, 1920, and for other purposes," approved by the President on the 31st day of December, 1919.

NOW, THEREFORE, I, WOODROW WILSON, President of the United States of America, by virtue of the Powers conferred upon me by said Act of Congress, hereby find and determine and by this PROCLAMATION do announce that it is no longer essential in order to carry into effect the purposes of the Act that the importation, manufacture, storage or distribution of certain necessities be subject to license, to the extent hereinafter specified.

Licenses heretofore required for the importation,

(Testimony of Andrew A. Brown.)

manufacture, storage or distribution of certain necessities are hereby cancelled, effective November 15, 1920, with respect to the following:

All persons, firms, corporations or associations engaged in the business of importing, manufacturing, storing or distributing sugar, or any product or by-product of the foregoing named necessary.

All regulations issued under the said Act covering licensees so dealing in these commodities are hereby canceled, effective November 15, 1920.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE in the District of Columbia, this 30th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty, and of the Independence of the United States of America the One Hundred and Forty-fifth.

(Seal)

WOODROW WILSON.

By the President:

NORMAN H. DAVIS,

Acting Secretary of State.

(No. 1579.) [172]

Further Redirect Examination.

Mr. PARTRIDGE.—Q. Mr. Brown, you told us about the amount of sugar refined by defendant, California & Hawaiian Sugar Refining Company. Was that sugar all from the Sandwich or Hawaiian Islands? A. No.

Q. Where did the rest of it come from?

(Testimony of Andrew A. Brown.)

A. Various countries.

Q. Well, where? A. Formosa, Java, Manila.

Q. Was that raw sugar from these countries?

A. Yes, except the additional 1000 tons of white which we melted.

Q. What extent or what proportion of your business comes from the plantations in the Islands, and by the "Islands" I mean the Sandwich or Hawaiian Islands?

A. A very large proportion.

Q. Under what kind of an arrangement does the California & Hawaiian Sugar Refining Company refine the raw sugar produced by these plantations?

The COURT.—This is going into a lot of detail.

Mr. McENERNEY.—I object to that on the ground it is irrelevant. They do not buy any of the sugar that we refine.

The COURT.—I do not see any materiality to that inquiry. It will be sustained as irrelevant.

Mr. PARTRIDGE.—May we have an exception?

The COURT.—Yes.

(EXCEPTION No. 3.)

Here the complainant rested.

Deposition of Benjamin Schneewind, for Complainant.

The deposition of BENJAMIN SCHNEEWIND, herein above referred to, as offered by the complainant and received in evidence was taken in Chicago on December 22, 1920, before Edward An-

(Deposition of Benjamin Schneewind.)

drew Doyle, notary public in and for the county of Cook, Illinois, and is as follows: [173]

Direct Examination by Mr. CHARLES LeROY BROWN.

I am president of the Continental Candy Corporation, a New York corporation, complainant in this action. I reside at Chicago, where the company has an office, although the main office is located in New York City. The Company was incorporated, approximately, May 1, 1919, and its business is manufacturing confectioners, which means that it manufactures and sells candies and confectioneries of all descriptions. We sometimes sell our surplus of raw material and supplies. Sugar is one of the principal items that we use in our business, and I conducted such purchases of sugar that was used by the company in Chicago, and some of the sugar for other plants of the corporation. Since the organization of the company it operated in Chicago, Jersey City, New Jersey, and New York City, New York; and since that time I have been President.

The greatest demand for sugar is in the fall of the year. During the first year of the corporate existence of the company, ending early in May, 1920, approximately twelve million pounds of sugar was used. My business experience has demonstrated the necessity of keeping figures on the world's production, and available sugars, and I had this in view in May, 1920. On May 1, 1920,

(Deposition of Benjamin Schneewind.)

approximately the entire beet crop of 1919-1920 had been disposed of. The Cuban position at that time showed six hundred and fifty thousand tons of sugar less in Cuba than at the same period last year. Louisiana is the only place in the United States which produces cane sugar, and that is not available until the latter part of November or in December. We tried to procure sugar on contract from various sources and were unable to do so at a fixed price. At that particular time sugar was hard to get. I made inquiry from Meinrath Brokerage [174] Company, who are the largest distributors of beet sugar in the country; they probably sell seventy-five or eighty per cent of all the beet sugar. They were trying to get some proposition from Western Beet Refiners and they submitted one proposition which was on the basis of the market price at time of shipment, less one-half cent per pound. In order to secure this sugar we had to put up Fifty Thousand Dollars, which was part of the purchase price, which was to be regulated by the market price on the date the shipment was made, the price being then unfixed further than that the price should be one-half cent per pound less than the price of cane sugar at the date of shipment in the fall.

In May, 1920, prior to my conversation with Mr. Tennison, who represented the Seavey & Flarsheim Brokerage Company, we were unable to obtain any cane or beet sugar contracts for fall delivery at a fixed price. The Seavey & Flarsheim Brokerage

(Deposition of Benjamin Schneewind.)

Company are sugar brokers, representing the California & Hawaiian Sugar Refining Company, one of the defendants in this case. They have an office in Chicago, and also, I think, in St. Louis and in Kansas City. Mr. Tennison, the representative of Seavey & Flarsheim Brokerage Company, in Chicago, called me on the telephone and stated that he had some 25 Dutch Standard, 99 Test Java Sugars for September shipment in Java, but that he only had two hundred and fifty tons left, which he would offer to us. He also had five hundred tons of October sugars; the price to be \$19.85 f. o. b. Coast. I told him I would let him know within a day or two whether I would take it. In the meantime I figured out what sugar we had due on contract, and our usual requirements for the months succeeding, and found that we did not have enough sugar, with these seven hundred and fifty [175] tons, to last us the balance of the year. I then stated this to Mr. Tennison and he told me he expected to get a further allotment within a few days, and he thereafter informed me that I could have five hundred tons more, for October shipment. The contracts attached to the bill in this case and marked "Exhibit A" and "Exhibit B," and dated May 14th and May 18th, 1920, respectively, were signed by me about on the dates they bear. The contracts were entirely drawn up and prepared before I saw them, and were presented to me by Mr. Tennison. After the first presentation to me of the contract of May 14, 1920, I asked Mr. Ten-

(Deposition of Benjamin Schneewind.)

nison why there was a clause in there restricting the sale, and why it was out quota from the California & Hawaiian Sugar Refining Company for the balance of the year; and he stated that they, the California & Hawaiian Sugar Refining Company, could not sell any sugar without those provisions in the contract. Mr. Tennison had charge of the Chicago office of Seavey & Flarsheim Brokerage Company, who were the representatives of the California & Hawaiian Sugar Refining Company's sugars. Not one word was said in my negotiations with Mr. Tennison about the inclusion of the clauses numbered 5, 6 and 7 in the contract, and I never requested the inclusion of these clauses. The provision in paragraph six of each of these contracts, restricting or prohibiting resale of sugar was not of any possible advantage to our Company, and I signed these contracts with the provisions of clauses 5, 6 and 7 in them because we could get sugar from no other source at a fixed price. I signed each of these contracts as President of plaintiff corporation, about the dates they bear, at Chicago, and made application for a letter of credit. I signed three copies of each contract and they were all sent to California for signature. I received one copy of each of them [176] back, executed by the California & Hawaiian Sugar Refining Company, some time about the middle of June. Some time after the original arrangements were made with Mr. Tennison, I procured letters of credit through the First National Bank and the Great

(Deposition of Benjamin Schneewind.)

Lakes Trust Company. The letters were dated respectively, June 1st and June 2d, and were issued on those dates. I read portions of the contract to Mr. Clifford, of the First National Bank, and Mr. Chatterton, of the Great Lakes Trust Company, showing the tonnage, date of delivery and the dates of shipment, the price and the description of the sugar, and obtained letters of credit from the First National Bank in the sum of three hundred thousand dollars, and the Great Lakes Trust Company in the sum of Two hundred and fifty-five thousand eight hundred dollars. No one other than myself had anything to do on behalf of the Continental Candy Corporation in obtaining these two letters of credit.

Q. (By Mr. BROWN.) Did the Continental Candy Corporation have a license, in 1920, issued by the Attorney General of the United States, authorizing the Continental Candy Corporation to carry on business in foods, in accordance with the proclamations of the President, and the Regulations prescribed by him under what is known as the Lever Act, as amended?

Mr. BALLOU.—I object to that.

A. Yes, sir.

Mr. BALLOU.—I object to the question, unless the license is produced, as not being the best evidence; and ask to see the license.

Mr. BROWN.—The answer admits that we had a license.

Mr. BALLOU.—Irrespective of any allegations,

(Deposition of Benjamin Schneewind.)

in the further and separate answers of the defendants, we claim that the [177] plaintiff must produce the license alleged in his bill of complaint, as to which the defendant in paragraph 1 of its answer states that it is without knowledge.

Mr. BROWN.—I would state, in reply to the objection, that the bill in paragraph 1, contains an error in its allegation,—that the plaintiff's license was obtained from the United States Sugar Equalization Board, and that we intend to amend the bill so as to show the license issued by the Attorney General of the United States, as alleged in the answer of the defendant, on page 28.

Mr. BALLOU.—That does not cover my entire objection, as I would want to see the date of that license, as well as its authority.

Mr. BROWN.—We will have to resume this afternoon, anyway, probably.

Mr. BALLOU.—Yes.

Mr. BROWN.—Q. Your answer was what?

A. Yes, sir.

In May, 1920, our business increased about seventy-five per cent over the same period of 1919. June business increased from five hundred thousand pounds in 1919, to nine hundred and twenty-seven thousand pounds in 1920; July, from five hundred and eighty-two thousand pounds to seven hundred and fourteen thousand pounds; in August, 1919, we shipped one million three hundred and twenty-seven thousand pounds; and in 1920, four hundred and twenty-two thousand pounds. In

(Deposition of Benjamin Schneewind.)

September, 1919, we shipped one million eight hundred and twenty-eight thousand pounds; and in 1920, six hundred and eighty-four thousand pounds. After the sugar shortage which I referred to, in May, 1920, the change in the ability of purchasers to obtain sugar commenced in August [178] when it was easier to obtain, and has been getting more plentiful ever since. In August, 1920, we received two and one-half million pounds, which was purchased along before the May contracts were entered into. After the receipt of the August shipment of sugar, the company, considering the then state of its manufacturing business, had a supply of sugar which was greater than its needs for a period of time, four or five months in advance. We sold some of this surplus. On December 1, 1920, we had a surplus. Most of our departments were closed down and not operating, on or about the first day of December, 1920, and ever since that date. We found our position was such, and it is common in the business of manufacturing candy and confectionery for the manufacturer at some times suddenly to find that manufacturing and selling conditions are such, that he will not need sugar for a considerable time in advance. The causes that may bring about this common condition are a good many: strikes, or fire, or amount of business; and at such times, candy manufacturers usually sell oversupplies of any raw materials that they have. We also sell contracts; that is, sell the sugar that is called for by any contracts

(Deposition of Benjamin Schneewind.)

we may have. We had quite a number of opportunities to sell these White Java sugars covered by the contracts of May 14 and May 18 with the defendant Company, if we had been free to sell them. Quite a number of persons approached us with reference to purchasing the White Java Sugars covered by the contracts of May 14th and May 18, 1920. John J. Jacques Company and Ruffner, McDowell & Company, sugar brokers, asked us quite a number of times if we had any sugars to sell, and especially these Javas.

My experience in the manufacturing of candy and the conduct of that kind of business has been extensive. [179]

Cross-examination by Mr. BALLOU.

The amounts of sugar which plaintiff corporation used during certain periods appear in our manufacturing reports. Our records cover daily, weekly and monthly periods. I can give records showing the amount of sugar used in the Chicago plant since the date of the incorporating of the Company. The sugar the subject matter of this contract was not entirely intended for use in our Chicago manufacturing. Part of it was intended to be used in Jersey City. From the date of the incorporation to date, I have never used Java White Sugar for manufacturing purposes. I have seen samples of it, but I never understood that it is a sugar that is not generally sold for direct consumption by housewives and others, but is suitable for manufacturing purposes. I do not

(Deposition of Benjamin Schneewind.)

know how it would be for manufacturing purposes. Nor do I know from my experience in the candy business how it compares for direct consumption by housewives with the cane granulated and the beet granulated. I should not think it would make any difference. At the date of the two contracts now in question, the only contract that we had in force was with Lamborne & Company, of New York.

Mr. BALLOU.—Q. Do you remember, in a report of June 30, 1920, a statement made to your stockholders that all your requirements for the remainder of the year were covered by your contract with the California & Hawaiian?

Mr. BROWN.—We object to the question, first on the ground that no statements in that report are competent, under the issues in this case; second, that if the inquiry is directed toward an admission, it is in no manner contrary to any statement of the witness on direct examination; and, third, that it is not cross-examination. [180]

Mr. BALLOU.—My justification for asking it is that the witness testified very generally and exhaustively as to the state of his stocks and his requirements at various periods during the year 1920, how his requirements increased or decreased; and any statement made by the corporation in its report to the stockholders as to the sufficiency of their requirements being covered, is proper cross-examination of that line of testimony.

(Deposition of Benjamin Schneewind.)

Mr. BROWN.—We have no objection to your asking him the fact, as to whether on June 30 the requirements were so and so.

Mr. BALLOU.—Q. Without waiving the question, without waiving the production of the company's own report on that subject, I will ask that question, whether on June 30, 1920, the Candy Corporation had covered its requirements for the year?

A. Yes, sir, it had.

We did not anticipate a heavy drop in business, which afterwards occurred.

I made the Lamborne contract and believed that that contract, and the California & Hawaiian contracts covered our company's requirements for the balance of the year. The Lamborne contract did not have any clause against resale, or any clause about quota, incorporated therein.

The Continental Candy Company succeeded the Novelty Candy Company on May 1, 1919, and enlarged the business.

Q. Now, at that date you were aware, were you not, that the sugar business of the United States was being done under a license?

Mr. BROWN.—We make the same objection to that.

Mr. BALLOU.—Answer it, subject to the objection that the question was one as to a matter of law. [181]

A. Well, according to the information that we got from the Secretary of the Association, the Manufacturing Confectioners did not have to be licensed.

(Deposition of Benjamin Schneewind.)

Q. But you have also stated that in the candy business you sometimes have to sell the surplus of raw material? A. Yes, sir.

Q. And sugar is one of your raw materials, is it not? A. Yes, sir.

Q. Now, from the information that you received, did you become aware that if you wanted to sell sugar you had to have a license to do it?

A. As soon as we found out we had to have a license we applied for one.

Q. When was that?

A. I do not know. I did not do that. The Secretary of the company did that.

Mr. BALLOU.—I ask that that Secretary be produced.

Mr. FOX.—Do you want to serve a subpoena?

Mr. BROWN.—The Secretary is in New York.

Mr. BALLOU.—Are you sure that the Secretary did that?

Mr. BROWN.—It is the Assistant Secretary.

At the time of making this application, I presume we made a report of our sugar usage. That is all I know. I do not remember interviewing any agent of the Department of Justice on the subject, nor of any agent of the Department here in Chicago investigating our application by personal interview with me. I do not know Mr. Maher, nor do I remember being interviewed by him. I have no independent recollection of when the application was made, but I think it was some time early in 1920. We went through the year 1919

(Deposition of Benjamin Schneewind.)

without any license to sell sugar. There was no necessity of selling any surplus raw sugar at that time, and therefore we did not apply for license. The [182] necessity of selling raw material first arose this year. Our business for the first six months did not increase over the same period last year; it was only May, June and July that had increased over last year, although the first three months were less than last year, although the total tonnage to July 1 was less than the same period last year, speaking only of the Chicago plant.

Under advice by circular from the National Confectioners Association, our attention was directed to the advisability of getting a license to sell surplus raw materials.

(Here the witness handed to Mr. Ballou a circular dealing with acute sugar shortage. The witness stated that this circular was not the one which inclined his mind towards the advisability of taking the necessary steps to get rid of a surplus but that it was information that the company received from the Association; that was the reason why he applied for a license.)

I think it was in May or June when we first applied for the license. It must have been several months, according to the best of my recollection, between the time the license was applied for and the date of its issuance. To the best of my recollection we applied for a license to sell sugar some time in May or June, 1920, and received it several months later.

(Deposition of Benjamin Schneewind.)

Mr. BALLOU.—Q. In paragraph 9 of your complaint you state that the plaintiff is bound by its separate contract with the First National Bank of Chicago and Great Lakes Trust Company, respectively, to repay each of these banks any sum advanced by it under the letter of credit. What do you mean by the separate contracts?

Q. Will you kindly produce those?

Mr. BROWN.—I will answer you now, that we do not [183] have copies of those.

Mr. FOX.—The banks would have them.

Mr. BROWN.—They are on file with the banks, but we cannot produce those.

Mr. BALLOU.—You will make an endeavor? I will ask the witness, you have no copies of the contracts with the First National Bank and the Great Lakes Trust Company with respect to the letters of credit?

A. We have no copy of it, no. We signed the application; that is all.

Mr. FOX.—You do not get copies.

Mr. BALLOU.—I am asking the witness.

Q. You signed the application? Is that what you refer to as the contract?

A. Yes, the application for the letter of credit. That is all we have. But I presume that is the contract we signed, for the application, for the letter of credit.

Q. You refer to it sometimes as the contract, and sometimes as an application?

A. I did not refer to it at all.

(Deposition of Benjamin Schneewind.)

Q. How?

A. I did not refer to it at all. Our attorneys.

Mr. BROWN.—As you ask to produce it, let me ask the witness, do we have any application, or copy of any application? A. We have not.

Mr. BROWN.—The witness not having any copy of the application, there is nothing for us to produce. So far as I have been able to ascertain from inquiry at the bank, there is no formal written application, but the bank upon getting the data for the letter of credit from the customer, makes out two or three [184] copies, a signed original of which is sent to the party in whose favor it is drawn, and an exact copy is delivered to the customer,—the third copy being retained by the Bank. On the back of the third copy is a printed form of contract by which in this case the Continental Candy Corporation agrees to repay the bank any acceptances made on the letter of credit. I am not certain whether precisely the same procedure was followed at the Great Lakes; as to whether the agreement to repay is printed on the back or is attached to the copy retained by the Bank.

Mr. BROWN.—Q. (To Mr. Schneewind through the courtesy of Mr. Ballou.) Now, that you have heard my statement in explanation of why we cannot produce these contracts, do you yourself know or remember as a result of conversations had between me and the representative of the First National Bank, at which you were present, that that is the statement that they gave us and that the

(Deposition of Benjamin Schneewind.)

statement I have made is true,—or am I wrong?

A. No, the statement is true. This is the first letter of credit I ever asked for at a bank and I know very little about it excepting that I signed the application. I think I signed a separate application. I do not mean the document on the back of the letter of credit. I signed a form that they presented to us, asking for a letter of credit. That is the only thing I remember of signing. I remember only one signature.

At this point the taking of the deposition was adjourned to 2:30 o'clock, P. M. of the same day, December 22, 1920, at which time the taking of the deposition was resumed.

The plaintiff offered in evidence, without objection, and by agreement between counsel, the following documents: [185]

Chicago, June 30, 1920.

Department of Justice,

Washington, D. C.

Gentlemen:

We beg to make application for a license to sell sugar.

Yours very truly,

CONTINENTAL CANDY CORPORATION.

FJK-MJ.

Department of Justice,
Washington, D. C.,
July 20, 1920.

Continental Candy Corporation,
212 East Austin Ave.,
Chicago, Illinois.

Gentlemen:

For your information we beg to advise you that your recent application for sugar license has been referred for investigation to Mr. A. W. Riley, Special Asst., to the Attorney General of the United States, 555 City Hall Station, New York City.

Please understand that this reference for investigation does not in any way reflect on your business methods but is merely in line with a new policy to investigate applicants for sugar license before issuing such licenses, in order that we may prevent speculators who are not regularly connected with the legitimate sugar trade, to enter the business at this time.

As soon as favorable report has been received, in this office from Mr. Riley, your license will be promptly issued. We suggest that it will greatly facilitate the issuance of this license if you will promptly communicate with Mr. Riley, furnishing him with all facts pertaining to your sugar transactions which he desires to ascertain. [186]

We trust this information may be of service to you.

Yours very truly,
DEPARTMENT OF JUSTICE,
License Station,
By M. M. HEALD.
NOT TRANSFERABLE.
No. G-172382.

UNITED STATES OF AMERICA.
LICENSE.

LICENSE IS HEREBY GRANTED TO Continental Candy Corporation, of 212 EAST AUSTIN AVENUE, CHICAGO, ILLINOIS, to engage in and carry on business in foods and feeds in accordance with the proclamations of the President and the regulations prescribed by him, relating to such business, under an act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, or any amendments thereof.

This license is subject at any time to revocation, in whole or in part, or for a limited or unlimited period, for violation by the licensee, or by any officer, agent or employee of the licensee, of any of the provisions of said Act or any amendment thereof or of said regulations now or hereafter in force.

The licensee is required, whenever called upon by the Attorney General of the United States, or his representative, to furnish information and to

make reports concerning his business in such details as shall be prescribed, and shall keep such records of his business as shall facilitate the verification of [187] information contained in said reports; and all property, books, records, and accounts of the licensee are at all times subject to the inspection of the Attorney General of the United States or his duly accredited agent or representative.

This license is based upon the statements in the licensee's application, on file with the United States Food Administration, Washington, D. C. All changes, such as change in firm or corporate name, new place of business, or changes in or additions to activities, must be reported immediately.

Dated—September 9, 1920.

(Signed) A. MITCHELL PALMER,
Attorney General of the United States.

Mr. BROWN.—Before adjournment this morning, we were asked to produce the copy of the contract, if any, between the plaintiff and the First National Bank of Chicago, with reference to the liability of the plaintiff to said bank on the bank's fulfillment of the letter of credit; and we stated that we had no copy; that the bank had heretofore refused to give us a copy thereof.

I desire to state, on behalf of the plaintiff, that during the noon intermission, Mr. Schneewind, Mr. Fox and myself, spent considerable time in the office of the First National Bank of Chicago, where there was exhibited to us an application

blank and the original contract on the subject last mentioned.

I state further that in a conference between Mr. Clifford and the attorneys for the said bank, it was finally decided to give us copies of that contract incorporated on the back of a copy of the letter of credit, as I stated this morning, and a copy of the written application blank, both of which I now produce and offer in evidence; a copy of the contract between the [188] Continental Candy Corporation and said First National Bank, dated June 2, 1920, and the same was received in evidence without objection, and are marked Plaintiff's Exhibits 1 and 2, respectively, and are hereto attached.

(Said documents were then received in evidence and marked, respectively, Plaintiff's Exhibits 1 and 2, and read as follows:)

Plaintiff's Exhibit No. 1.

B. Chicago, June 2, 1920.
To THE FIRST NATIONAL BANK OF
CHICAGO.

Gentlemen:

Having received from you the Letter of Credit on our account of which the annexed is a copy, for \$300,000.00 U. S. Currency, the undersigned hereby agree to its terms, and in consideration thereof agree to pay you the amount of each acceptance under it, at maturity, in cash, or prior thereto, if you request it, and it is understood by the under-

signed that the commission for accepting under this credit is to be 1/8% per cent on drafts at sight sight, plus any charge for confirmation.

The undersigned also agree to pay you the amount of any revenue stamps which you may be required to attach to any acceptances drawn thereunder.

The undersigned hereby give you a specific claim and lien on all goods or merchandise (and the proceeds thereof) for which you may have paid or come under any engagements under this credit, and on all policies of insurance (which the undersigned agree to effect) on such goods or merchandise to an amount sufficient to cover your advances or engagements under this credit and on all bills of lading given for same, with full power and authority to take possession and dispose of the same at [189] discretion, at either public or private sale, with or without notice, for your security and reimbursement and to charge all expense, including commission for sale and guarantee. And at any auction or public sale by you hereunder you may bid and purchase as freely as third parties. And the undersigned further agree to give you any additional security that may be demanded. And the undersigned further pledge to you as security for any other liability or liabilities of the undersigned to you, due, or to become due, or that may be hereafter contracted or existing, howsoever acquired by you, any surplus that may remain, either in goods or in the proceeds thereof after providing

for the acceptance under this credit. We further authorize you to cancel this Letter of Credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user; and in case you feel insecure or unsafe at any time, any indebtedness due from you to us may be appropriated and applied hereon as well before as after the maturity of any acceptance then outstanding on account of said Letter of Credit.

Neither you nor your correspondents in — shall be responsible for any loss arising from any difference in quality or character of merchandise imported under this credit from that stipulated and expressed in the invoice accompanying the drafts, nor for correctness or genuineness of documents, nor for delay or deviation from instructions in regard to shipment.

This obligation is to continue in force and to be applicable to all transactions, notwithstanding any change in the individuals composing the respective firm parties to this contract, or either of them, or in that of the user of this credit, whether such change shall arise from the accession of one or more new partners, or from the death or secession of any partner or partners. [190]

Very respectfully,

CONTINENTAL CANDY CORPORATION,

(Signed) BENJAMIN SCHNEEWIND.

No. G. C. A6385

Paid-up Capital \$10,000,000

\$300,000.00 (U. S. Currency) Surplus..\$12,000,000

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Calif.

Gentlemen:

We hereby authorize you to value on the First National Bank of Chicago at sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard @ \$19.85 per 100, to be shipped to Chicago, Ill.—Shipment from Java, 250 tons in September & 1000 tons in October, 1920.

The Bill of Lading must be issued to the order of Shippers and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and the advice thereof (in duplicate) sent to The First National Bank of Chicago accompanied by Bill of Lading and abstract of invoice, on receipt of which Documents the Bills will be duly honored.

The remaining Bills of Lading with certified Invoices and Consular Certificates must be sent by the Bank or Banker negotiating drafts to ——— for account of the First National Bank of Chicago, and a certificate to that effect must accompany draft.

We hereby agree with drawers, endorsers and *bona fide* holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation

[191] at the counter of the First National Bank of Chicago. This credit is confirmed and irrevocable.

Insurance ———.

Drafts drawn under this credit must bear upon their face the words:

“Drawn under The First National Bank of Chicago.

“Credit No. G. C. A 6385 dated June 2, 1920.”

If desired, drafts drawn under this credit will be paid at the counter of the First National Bank of San Francisco, Calif.

Respectfully yours,

THE FIRST NATIONAL BANK OF CHICAGO.

Plaintiff's Exhibit No. 2.

G. C. No. A6385.

APPLICATION FOR COMMERCIAL CREDIT.

THE FIRST NATIONAL BANK, CHICAGO.

Please furnish us with a credit on ———.

as per the following particulars: ———

Amount..... \$300,000.

In favor of..... A/S.

Drafts to be drawn

at California & Hawaiian Sugar
Refining Co. San Francisco,
A/S.

For shipment of..... 500 tons (2240 lbs. each) 99
test 25 Dutch Standard @
\$19.85 FOB. San Francisco,
duty paid.

To..... Shipt. from Java 250 tons in
Oct. and 250 November.

(Deposition of Benjamin Schneewind.)

Via.:.....

Expiration of Credit— Dec. 31, 1920.

Insurance.....

Custom H'se Brokers.

Special Directions.

[192]

Respectfully,

(Signed) CONTINENTAL CANDY CORP.

Chicago, Ill.

Chicago, _____, 192—

Mr. BROWN.—We have previously asked the Great Lakes Trust Company for that copy, and they have not given it to us, and we have not any copy, and during the brief noon intermission I had no time to go to their office.

Mr. SCHNEEWIND was recalled to the witness-stand and testified under examination by Mr. BROWN:

My recollection is now refreshed by the exhibition of these documents and I remember that I signed a similar agreement with the Great Lakes Trust Company. I presume that I signed both an agreement and an application which were not identical but were generally along the same lines and for different amounts.

Mr. BROWN.—I will say, that if you will consent to a brief adjournment at the end of the session this afternoon, I will go to the Great Lakes Trust Company and see if I can get it.

Mr. BALLOU.—If you can find it feasible I shall

(Deposition of Benjamin Schneewind.)

be glad to have it done. If it is not feasible, of course, you cannot do it.

At this point the witness produced certain records and his cross-examination was continued by Mr. BALLOU.

Q. You hand me a document with hand written figures on both sides of it, entitled on one side "Materials Used," which runs by months from 1915 to October, 1920, inclusive, with pencil figures on sugar and corn syrup for November, 1920. Now, confining yourself solely to the question of sugar, what do those figures represent under each month? A. Actual use.

Q. The actual use of sugar in pounds? [193]

A. Yes, sir, in pounds.

Q. I will conclude from this that the records of the Novelty Candy Company and the Continental Candy Corporation were kept together.

A. They were kept together.

Q. Even after the incorporation of the Continental Candy Corporation? A. Yes, sir.

Q. Now, reading from this solely on the question of sugar, and solely from May 1, 1919, to date, I read as follows:

1919.

May	269,713
June	257,088
July	344,518
August	705,655
September	789,846
October	732,960

(Deposition of Benjamin Schneewind.)

November	577,059
December	280,948

1920.

January	369,763
February	444,811
March	335,368
April	260,357
May	375,806
June	490,212
July	463,089
August	458,146
September	320,128
October	256,235
November	122,463

[194]

The witness continuing: From July, 1919, to December, 1919, the total used amounts to 3,430,986 pounds, and the total from January to June, inclusive, of 1920, is herein stated to be 2,303,317 pounds. Under the Lamborne contracts during May we had 5,000 bags for shipment in June; 5,000 for July; 10,000 for August, and 5,000 for September, each bag containing one hundred pounds.

Q. Now, that your memory has been refreshed as to the date of the application for a license to sell sugar, can you state whether or not you made that application in view of having a possible surplus?

A. Well, we always sold more or less sugar according to our requirements, and under the first instructions from the National Confectioners Asso-

(Deposition of Benjamin Schneewind.)

ciation, where it was stated positively that manufacturing confectioners would need no license. But when Mr. Riley was in charge of the sugar distribution, he notified the confectioners that everybody must have a license, and that was in June when this application was made.

Q. Have you any way of fixing the date of the communication from Riley?

A. No, sir. I don't think we had any communication excepting through the Association.

We sold some sugar from January 1, 1920, say, to the end of May. Almost everybody was anxious to get sugar during these months, but we had not sold any—we had set aside a certain amount for our own use which we expected. It was future contracts that we had for sugar under the Lam-borne contract.

Q. But did you during that time sell any sugar that you actually had received and stored?

A. No, we didn't.

Q. You didn't? A. No, sir.

Q. But you did sell contracts for sugar, did you?

A. Yes. [195]

Q. Is that what you testify? A. Yes, sir.

Q. You sold from time to time, from your Lam-borne contract, sugar you had not actually received?

A. Yes.

Q. And which you supposed you would not need?

A. Yes. We sold some to the Western Grocery Company and to Hulman & Co. The only reason that we did not apply for a license was because

(Deposition of Benjamin Schneewind.)

it was our understanding that none was necessary at that time.

We had been considering for a long time getting a license, but on the advice of the Association, we did not do it until we found that Riley was in charge, and we thought it necessary at that time to do it, not with the idea of selling any more sugar, but just that if we did come to the point that it was necessary to sell sugar, that we would be in the position under the license to do so. When we were informed that the man in the Attorney General's Department required it, we didn't go around to find out whether he had the right to require it, or whether it was legal that he should require it. We went and did it. We did not not take any legal advice as to whether Mr. Riley's requirements was legal or not. Mr. Hughes, the Secretary of the National Confectioners Association, advised us that it was immaterial whether or not we had a license; but we thought it would be safer by obtaining one. It was a great deal safer in the sugar business if we found a man in authority in the Department of Justice required something, to meet that requirement, even though my personal opinion might be that it was unnecessary. I do not think that during the month of June we sold sugar for future delivery out of this Lamborne contract; although I think the sales were made maybe in June—I have forgotten exactly the time now. We sold some sugar just [196] recently. We only sold three or four lots at different times

(Deposition of Benjamin Schneewind.)

between January and June. We sold a number of lots, one hundred bag lots and 200 bag lots, in order to dispose of it subsequent to the 1st of June, during October and November, and some this month. That sugar was actually on hand, sugar that we had on hand in stock. I repeat, we sold three or four lots before the 1st of June. From the 1st of June to the 1st of September, I can't tell you how many lots we sold, but we had sold a good many lots between June and the present time—a good many different lots. We had three or four brokers selling from time to time by 100 pounds or thousand pound bags. When we didn't use as much sugar we began to dispose of it. It was high priced sugar and we desired to reduce our inventory. There was no provision against reselling. In every contract we were free to resell if we wanted to do so. It was before we felt there was a pinch coming in sugar that we sold the three or four lots between the 1st of January and the 1st of June. After we found a pinch was coming, we didn't sell any, not until the business began to fall off again. On the 1st of December, 1920, we were not stocked up with more sugar on hand and under contract. We had no contracts. The last deliveries were made in October on that Lamborne contract, and we had no other contracts outstanding except these. That is all. Those are the only contracts we have; for instance, we replaced, on account of the Lamborne sugar not being satisfactory for some purposes, we replaced, we sold about an equivalent of three

(Deposition of Benjamin Schneewind.)

hundred barrels and bought Diamond A at about the same price, to get sugar that we could use for certain purposes; but that was the only purchase of sugar that we have made this year outside of the California and Hawaiian. The Lamborne contract was made last year, and the [197] C. & H. this year. We had dealt with Seavey & Flarsheim, and through them bought sugar of the California & Hawaiian, a good many years. I know that for the last year or two they have made the practice of practically taking our order and having us sign the contract, and then sending it back to the California & Hawaiian Refinery for their signature. I don't know whether they did that before or not; I don't remember. Seavey & Flarsheim did not purport to sign it themselves as agents of the California & Hawaiian. They came to me and told me they had sugar for sale and asked me to buy it. When we bought it and signed the contract they did not sign it as agents, but always sent it back to San Francisco for confirmation and signature. When Mr. Tennison presented these contracts I had some conversation with him as to the meaning of the quota clause which read as follows: "7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year." My understanding of that was that they would not deliver us any more sugar for the balance of the year. I did not know that was in the contract

(Deposition of Benjamin Schneewind.)

when I signed it on May 14th. I did not make the agreement when I purchased the sugar. I did not know there was any agreement of that kind being made a part of the contract. I did not know it when we made the oral agreement. When Mr. Tennison came out with this form of contract in which that appeared, I read it before I signed it, and this clause struck me at that time, before I signed it, and we had some discussion before I signed it. I understood that it meant that we could not get any more sugar from the C. & H. Refining Company of any kind. Four days after the first purchase was made I had not seen the contract. These contracts were handed to me [198] together. They were dated on different dates, separately, because they were purchased on different dates. When I got the letter of credit from the banks I would have shown the contracts to them, but they did not ask me for them. I read to them only the price and the number of pounds and the delivery. As to the delivery I said September shipment—250 tons for September shipment from Java, and a thousand tons for October shipment from Java. I didn't say anything to the bank about when that delivery would be completed. The First National Bank of Chicago asked me when the letter of credit expired. I said December 31st. My basis for saying that was that I wanted to give them plenty of time to ship the sugar before the letter of credit expired. I don't remember any discussion about the clause in the First National

(Deposition of Benjamin Schneewind.)

Bank of Chicago letter "the shipment must be completed," emphasizing that, as well as the bill must be drawn before December 31st, 1920. The California & Hawaiian Sugar Refining Company never raised any objection to the clause in the letter of credit that we sent them, that the shipment must be completed before December 31, 1920. We never had a letter direct from the C. & H. Company from the dates of these purchases. I began to think that on account of changing business conditions, or for other reasons, these contracts might be onerous and hard on us when I considered selling them. I don't remember the date exactly; it was in September some time. I made no suggestions as to modifying the terms of this contract. I did write a letter to Seavey & Flarsheim on it at their request. I am mistaken,—it was written to the C. & H. Company. It suggested that they delay the shipment of the sugar. That letter was written directly to C. & H. and not to Seavey & Flarsheim. That was in August or September, the letter will show. I don't know exactly the date so many things have happened since then. When I said I had an opportunity to sell [199] the sugar through inquiries from Jacques and Ruffner & McDowell, it was September and October, and even last month, that they made these inquiries. I made no request of the C. & H. that I be permitted to sell to them. The letter to the C. & H. was written in reply to Mr. Tennison's coming over to see us and making the change in the sugar. In other

(Deposition of Benjamin Schneewind.)

words, they offered to change the delivery of the sugar and give us C. & H. refined in place of Java. That offer was made by Mr. Tennison and Mr. Flarsheim himself. The offer was to substitute C. & H. for the Java sugar, not upon the same date of delivery, but for immediate shipment. In response to that offer thus made by Mr. Tennison, I wrote a letter covering all the facts in that matter. I kept a copy of that letter but haven't it here. I did not request the C. & H. Company to allow us to resell that sugar, because the contract specifically said we were not allowed to. We made other modifications in the contract at their request.

Q. What modifications did you make at their request?

A. Eventually there was none. They offered to make some recommendations which we thought would change the situation, but on account of the less volume of the business we were having, why we couldn't use the sugar. I did write to Seavey & Flarsheim requesting a delay in the shipment, or to the C. & H. Refining Company and I gave my reasons in the letter for delaying it, and I have no further explanation to offer as to why we never asked them for permission to resell. It never occurred to me that the securing of our license of September 9, 1920, might have any possible bearing upon our right to resell. It never occurred to me that the securing of our license of September 9, 1920, if we had communicated that fact to the C. & H. Company, would have had any bearing

(Deposition of Benjamin Schneewind.)

upon their willingness that we should resell. [200] I can't remember the price of sugar on May 14, 1920, the date of this contract. I can't remember the price on the 18th of May, 1920. I can't remember either the price of refined sugar at New York or seaboard basis, or any other place, on any particular date. I remember approximately what it was by the 1st of December, nine cents. I never gave the C. & H. Refinery any notice that we repudiated this contract.

On redirect examination by Mr. BROWN, the witness testified:

When I say we never gave any notice, I mean that I personally never gave any such notice. The notice was given through our attorneys, Brown, Fox & Blumberg, they represented us. I did not give any personal notice. I notified them to bring action against them. I am familiar with the notice that Mr. King gave in writing in San Francisco. The notice which he gave was the notice of repudiation and rescission of the contract on the ground of illegality, among others. I remember now that notice was given to the C. & H. Company. I have forgotten whether it was signed by me or not. In testifying that eventually there was no modification of either of the contracts of May 14, 1920, and May 18, 1920, I did not mean to deny that there was that modification as to the place of shipment, as this is alleged in the bill and admitted by the answer of the C. & H. Company as to the modification by which Crockett was

(Deposition of Benjamin Schneewind.)

substituted for San Francisco. My idea of San Francisco or Crockett is just a question of delivery from either point. It would not make any difference. I knew that change was made. I have spoken of Mr. Hughes, Secretary of the National Confectioners Association. He is not a lawyer. He represented the Association at Washington and was a dollar a year man in the Government [201] Service for a time. His position in the United States Food Administration was with reference to sugar. I don't know what his position was; I can't remember that. I know he was located in Washington and was trying to help the confectioners all he could to secure their allotment or percentage of sugar that they were allowed. I don't remember what his position was in the Government Service at another time. He was secretary of the National Confectioners Association for a good many years. He was not in the Government Service and also secretary of the National Confectioners Association at the same time. He was in the service of the National Confectioners Association and not in the service of the United States Food Administration. Mr. Hughes devoted a considerable part of his time after the enactment of the Lever Act in August, 1917, and the creation of the Food Administration, to study and consideration and advice to the candy manufacturers and confectioners, of the proper conduct of their business under the law. He was assisted by Thomas Lennen, who was

(Deposition of Benjamin Schneewind.)

the attorney. All the advice he sent out was under Mr. Lennen's instructions and directions.

Q. In your cross-examination you said at one time that you corresponded altogether with Seavey & Flarsheim Company and not with the California & Hawaiian Sugar Refining Company, and at another time you stated you wrote a letter to the California & Hawaiian Sugar Refining Company. Who corresponded with you on behalf of the seller; the California & Hawaiian Sugar Refining Company or the Seavey & Flarsheim Company?

A. The Seavey & Flarsheim Company.

Q. Did the California & Hawaiian Sugar Refining Company ever address any letter to you?

A. No, I don't remember.

Q. Or to the Continental Candy Corporation with reference to either of these contracts of May, 1920? [202]

A. No, sir, not that I remember.

Q. When you were negotiating with the Seavey & Flarsheim Company with reference to the last-mentioned contracts, did any one of them ever ask you whether you had a sugar license?

A. No, sir.

Q. Or any license from the Federal Government?

A. No, sir.

Q. Under the Lever Act? A. No, sir.

On recross-examination by Mr. Ballou, the witness testified that he did take the advice of Mr. Hughes, and that Mr. Hughes advised not to take a license; but that in spite of that, he applied for and got a license afterwards, when the change

(Deposition of Benjamin Schneewind.)

was made and Riley was in charge; that Riley talked with Mr. Hughes, and he said: "Well, you might just as well get a license."

Upon redirect examination continued by Mr. BROWN, the witness testified that he or his company conferred with Mr. Hughes, to the witness' knowledge, very, very often, prior to June, 1920, and that for a considerable time, for a long time, Mr. Hughes told him that no license was required; that it was Mr. Hughes who told the witness of the coming into office of Mr. Riley and of the different view of Mr. Riley and that was about the same time as the date of the application for the license.

On recross-examination continued by Mr. BALLOU, the witness testified that he understood that Mr. Riley had different views on the subject of the license from Mr. Hughes; that he did not understand how recently Mr. Riley had been in the Attorney General's office at the time he made the application; that the witness had never at any time consulted a lawyer directly as to whether he could sell this sugar without a license before June of that year.

On redirect examination continued by Mr. BROWN, the [203] witness testified:

Our lawyers in Chicago are Brown, Fox & Blumberg. We never consulted Brown, Fox & Blumberg in any matter about this contract prior to November, 1920. We did not consult them about the May 14 and May 18, 1920, contracts prior to November, 1920, nor did we ever consult them about

(Deposition of Benjamin Schneewind.)

any matter of license prior to the commencement of this suit, and never consulted any other lawyers about a license prior to the commencement of this suit.

Q. You were also asked about whether you know of the recent advent into office of Mr. Riley, and as I understand you, you say you did not know whether he had recently come into office or had been in office quite a while; but did you know or were you informed whether he recently came into office or not. That he recently had taken charge of some branch of the work incident to sugar administration?

A. Yes, sir. I understood that he had been taken from some other branch of the Government and placed in the sugar department.

**Testimony of George J. Tennison, for Defendant
Sugar Refining Company.**

GEORGE J. TENNISON, called in behalf of the defendant Sugar Refining Company, after being duly sworn, testified as follows:

I reside at Chicago and am the Chicago Manager for the firm of Seavey & Flarsheim Brokerage Company, brokers representing the California & Hawaiian Sugar Refining Company, in the Chicago market, which includes some territory in Wisconsin and in Illinois, outside of Chicago. I have been such representative for five years, and was in that capacity in April and May of this year. I sold Java Sugars of the California & Hawaiian Sugar Refining Com-

(Testimony of George J. Tennison.)

pany during the year, and I sold sugar to the Continental Candy Company under two contracts, dated May 14th and May 18th. [204]

Mr. CAMPBELL.—What protest was made by the Continental Candy Corporation against any clause in this contract?

A. Do I understand you, at the time the sugars were sold.

Q. Before you made the contract, or at the time.

A. None.

Q. None, whatever? A. No.

Q. Has there ever been any objection on the part of the Continental Candy Corporation to clauses 6 and 7 in these contracts? A. Yes.

Q. When? A. Late in November.

Q. What was said?

A. In a telephone conversation to Mr. Schneewind, advising him of the arrival of Javas on certain shipments, he then advised me that his attorneys were about to enter—

Mr. PARTRIDGE.—If your Honor please, I will object to any further testimony as to what happened at that time. I cannot see that it is of any consequence.

Mr. McENERNEY.—We simply want to fix the first time that they ever protested in the matter was through this witness in November, and then they said they had their attorneys in San Francisco—

A. (Continuing.)—about to take up the case.

Mr. PARTRIDGE.—Just a moment.

Mr. McENERNEY.—So that they waited until

(Testimony of George J. Tennison.)

the middle of November on a falling market before they found holes in the contract—

The COURT.—When the time comes to argue the case we will argue it; until we do that, let us get the evidence in. Just please follow the rule of procedure. What is the objection?

Mr. PARTRIDGE.—My objection to it is that it is entirely immaterial what happened in November in regard to any [205] protest. We allege and there is admitted a rescission of the contract.

The COURT.—I suppose that is true, the fact that they did not make any—if they did not make any at time the contract was entered into, that is all that is material in that behalf; what they might have said afterwards would not change it.

Mr. McENERNEY.—Will your Honor hear me a moment?

The COURT.—Yes.

Mr. McENERNEY.—We have an affirmative defense that on a falling market they made no complaint until November, 1920. That is all we want to prove, the protest, your Honor. Now, if it is admitted that they made no protest—

The COURT.—Mr. Partridge is objecting to the language employed. I don't know whether that would be objectionable or not. I suppose whatever they said, they would be bound by. The objection is overruled.

(EXCEPTION No. 4.)

Read the question. (The record was here repeated by the reporter.)

(Testimony of George J. Tennison.)

A. (Continuing.) And made objection in connection with paying the irrevocable letters of credit on presentation of the drafts on these Java purchases, on account of clauses 6 and 7, stating that they were illegal.

Mr. CAMPBELL.—Q. Is that all he said?

A. That is all.

Mr. McENERNEY.—May we fix that date? Did you send the California & Hawaiian a telegram announcing that fact?

A. We sent them the answer the same day that I had that telephone communication with them.

Q. Can you tell us what that date was?

A. I would [206] say it was November 27.

Q. That is the first communication you had with them indicating a dissatisfaction with the contract? A. Yes.

The COURT.—Did I understand you to say that was after you had advised them of the receipt of the sugar in San Francisco? A. Yes.

Mr. McENERNEY.—That is all.

Mr. PARTRIDGE.—No questions.

**Testimony of E. B. Montgomery, for Defendant
Sugar Refining Company.**

E. B. MONTGOMERY, called in behalf of the defendant Sugar Refining Company, after being first duly sworn, testified as follows:

I am Special Agent of the Department of Justice, Bureau of Investigation, and have held this position a little over three years. I have been

(Testimony of E. B. Montgomery.)

located in San Francisco, all of that time. I was assigned to the supervision of sugar about June or July, 1918. I have been engaged in this work from January 1st, 1920, up to the present time, and am now in the sugar business. I became acquainted with the officers of the California & Hawaiian Sugar Refining Company early in 1920, and am familiar with the purchase of 10,000 tons of Java Sugar White made by that company, and its resale. I had discussions with the officers of the company respecting that resale.

Q. (By Mr. McENERNEY.) Now, from whom did you receive your directions in respect of the matters covered by your dealings with the defendant Sugar Refining Company, so far as it related to the 10,000 tons of Java whites?

A. Mrs. Annette Adams, United States Attorney.

Mr. McEnerney here exhibited to the witness the two original contracts involved in the case, dated May 14th and May 18, 1920, and the same were offered and received in evidence, and marked respectively Defendants' Exhibits "I" and "J," [207] and read as follows:

Defendants' Exhibit "I."

ORIGINAL.

SEAVEY & FLARSHEIM BROKERAGE CO.

326 West Madison Street,

Chicago, Ill.

CONTRACT.

In Triplicate.

May 14, 1920.

1. The California & Hawaiian Sugar Refining Co., of San Francisco, have today sold, and the Continental Candy Corporation of Chicago, Illinois have today bought the following sugars:

750 tons, each 2,240 lbs. 10% more or less, White Java Sugar at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California; 25 Dutch Standard—99 Polarization.

250 tons, 10% more or less, shipment from Java
September, 1920

500 tons, 10% more or less, shipment from Java
October, 1920

2. PAYMENT: Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other un-

foreseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

4. Any change of import duty understood to be for account of buyer.

5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & [208] Hawaiian Sugar Refining Co., from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION,

BENJ. SCHNEEWIND,

President.

Confirmed and accepted.

(Seller) CALIFORNIA AND HAWAIIAN SUGAR REFINING CO.,

L. CAMPIGLIA,

Asst. Sales Manager.

Defendants' Exhibit "J."

ORIGINAL.

SEAVEY & FLARSHEIM BROKERAGE CO.

326 West Madison Street,

Chicago, Ill.

CONTRACT.

In Triplicate.

May 18, 1920.

I. The California & Hawaiian Sugar Refining Co. of San Francisco have today sold, and the Continental Candy Corporation of Chicago, Illinois have today bought the following sugars:

50 tons, each 2,240 lbs. 10% more or less, White Java Sugar, at \$19.85, net cash, duty paid, landed weights, FOB cars San Francisco, California, shipment from Java during October, 1920; No. 25 Dutch Standard, 99 Polarization.

2. PAYMENT.—Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Co. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

3. It is agreed that should strikes, wars, revolutions, accidents, danger of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of cancelling this contract.

(Testimony of E. B. Montgomery.)

4. Any change of import duty understood to be for account of buyer. [209]

5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

7. Sales of this sugar to manufacturers constitutes their quota of sugar for the California & Hawaiian Sugar Refining Co. from delivery date of these Java Whites until the end of the year.

(Buyer) CONTINENTAL CANDY CORPORATION,

BENJ. SCHEEWIND.

Confirmed and accepted.

(Seller) CALIFORNIA & HAWAIIAN SUGAR REFINING CO.

L. CAMPIGLIA,

Asst. Sales Manager.

Mr. McENERNEY called the witness' attention particularly to clauses 6 and 7, and thereupon interrogated him and he gave evidence as follows:

Q. And I now ask you if prior to May 14, 1920, you had to do with the officers of the company in respect of the insertion of these clauses in the contracts for the sale of the 10,000 Java white?

A. Yes, but I never saw these contracts.

(Testimony of E. B. Montgomery.)

Q. But you are familiar with the form, are you? A. Yes.

Q. Did you instruct the defendant Sugar Refining Company that these clauses were required by the Department of Justice to be inserted in all contracts for the resale of that Java white?

Mr. PARTRIDGE.—I will object to that as leading.

The COURT.—Yes, it is very leading. Ask him what he said, if anything.

Mr. McENERNEY.—Q. What direction did you give them, if any, in respect of the classes of buyers to whom that sugar might, under the direction and control of the Department of Justice be sold?
[210]

A. I informed them that the United States Attorney had instructed me that the sale could be made, provided it was sold to manufacturers for manufacturing purposes only, and was not to be resold; also that the manufacturers purchasing the sugar would have to understand that it was their quota of C. & H. sugar for the year, and that the C. & H. would observe that condition.

Q. From whom did you get those orders?

A. From Mrs. Adams.

Q. To whom did you communicate them?

A. I communicated them to Mr. Brown.

Q. A. A. Brown? A. Yes.

Q. Sales Manager? A. Yes.

Q. How often were you, from January until June,

(Testimony of E. B. Montgomery.)

1920, in the office of the California & Hawaiian Sugar Refining Company?

A. I would hate to say how frequently, but I was there two or three times a week, as often as anything came up that made it necessary that I go there.

Q. Did they exhibit to you the sugar that they had on hand and were about to receive, and how it was being disposed of by them—was that a part of the routine of your calls?

A. Not physically, but I was advised all the time of the amount of sugar they had on hand, and of the arrivals, and I received that notice from other places, too.

Q. And how they were disposing of it?

A. I was aware of that.

Q. You say you did not see these particular contracts? A. No.

Q. Did you know of sales being made to the Continental Candy Corporation?

A. No, I do not think that I did. I knew of the sale of the 10,000 tons, but as to the Continental Candy Company, I do not think I did know. [211]

Q. But you knew, were informed, that it was going out only to manufacturers? A. Yes.

Q. Did Mr. Brown tell you that they were complying with the terms of your notification to him in the sale of that sugar?

A. He told me that they would be complied with.

Mr. McENERNEY and Mr. PARTRIDGE.—
That is all.

**Deposition of Mrs. Annette Adams, for Defendants
Sugar Refining Company.**

(The deposition of Mrs. ANNETTE ADAMS, herein above referred to, was here formally offered by the defendant Sugar Refining Company as a part of its case and was received in evidence. The said deposition was taken on behalf of said defendant in Washington, D. C., on December 21, 1920, before Berenice Broy, a Notary Public in and for the District of Columbia.) Said deposition is as follows:

On direct examination by Mr. Ballou, the witness testified as follows:

My name is Mrs. Annette Abbott Adams, and my present position Assistant Attorney General, former United States Attorney at San Francisco. I now reside in Washington. I was United States District Attorney at San Francisco from July, 1918, to June 26, 1920. During that time as United States District Attorney, I did have something to do with the enforcement of the so-called Lever Act. That work was in the hands of the United States Attorney under direction from the Attorney General. I had special work with reference to sugar. We had a good deal of work from time to time concerning sugar. We had one agent of the Bureau of Investigations, Mr. Montgomery, who spent most of his time looking into the sugar situation; likewise, we had a Fair Trade Board, as it was called, made up of about thirty-five men and women who were appointed by the Attorney General. They assisted us generally in the enforcement work. Mr. E. B. [212] Montgomery is a regular employee of the

(Deposition of Mrs. Annette Adams.)

Department of Justice, in the Bureau of Investigation, who was just assigned by his chief to assist me in that particular line. His relation to me, for instance, during the month of May, 1920, was that he was acting under my direction in investigating all of the various conditions, particularly as they applied to sugar. He went about from time to time, first to the refiner, then the wholesaler, and investigated the retailers who were making too great a margin. Mr. Montgomery was pretty generally in conference with the refiners. Every few days he went to them and the refiners co-operated with us in the effort to equitably distribute sugar.

With my attention called to the clause of the contract between the California and Hawaiian Sugar Refining Company and the Continental Candy Company, the clause being identical in the contracts, and numbered 6, commencing: "Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same and the sales of this sugar to the manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining company from delivery date of these Java whites until the end of the year." I must say that in the beginning I do not recall this particular form. Any statement that I may make will apply generally. I do recall, having refreshed my recollection since talking to Mr. Ballou yesterday, because I found Mr. Montgomery's report that he

(Deposition of Mrs. Annette Adams.)

made at the time, which connects up in my mind these incidents.

We were endeavoring, as a part of our work in reducing the high cost of living and enforcing the Lever Act, to bring about the same equitable distribution of sugar that had been had under the Food Administration and the Sugar Equalization Board. There was no legal provision that the sugar should be so [213] distributed, but the refiners agreed with us that they would, as far as possible, continue their allotment of sugar, giving their customers proportionate parts, that portion to depend upon the business which they had transacted with them theretofore. In other words, each wholesaler, when a particular lot of sugar was ready for distribution, was to have his proportionate share of that sugar. And we were endeavoring to prevent any wholesaler or any retailer or any manufacturer from hoarding sugar; that is, from obtaining a portion or contracting for a greater supply of sugar than he needed for his immediate needs, for his reasonable use, for a reasonable time, which is the language of the Act.

In order to do that, the co-operation of the refiners was necessary and important, and therefore we asked the refiners—not I, myself, because I do not think I consulted with them, but I conferred frequently with Mr. Montgomery, and with Mr. Miller, about this, and they conferred with the refiners, and Mr. Miller and Mr. Montgomery both reported to me from time to time that the refiners were doing that.

(Deposition of Mrs. Annette Adams.)

Now, I recall that sometime during the spring, and I cannot remember the date exactly, but it was subsequent to the middle of April, because I got back from the East the middle of April, Mr. Montgomery discussed with me the proposition of the Hawaiian Sugar Company selling some Java sugar to some manufacturers in the Middle West, and asked if we could have any objection to that sale. And we were rather hesitant because we felt that probably that was outside of their regular clientele. In other words, by distributing that to Chicago, to send sugar from San Francisco to Chicago, that western sugar dealers and consumers might be deprived of a portion of their allotment.

We took this matter under consideration and there was a [214] discussion on between Mr. Miller and myself about it, and between Mr. Montgomery and myself about it, and finally we agreed that we would offer no objection to their forwarding it if they would see to it that that sugar went into the hands only of the consumer. In other words, that it would not go into speculative channels.

We found about that time that sugar was being shipped ostensibly for California use, and was being re-routed after the cars left San Francisco to some other point, and that there was more sugar going into Chicago, we felt, than Chicago was justified in receiving from the West, because we thought if they were slipping it over on us and getting more than they were justified in receiving

(Deposition of Mrs. Annette Adams.)

that they were probably doing the same thing to the other sections.

And, therefore, that agreement was made by the sugar people, that if they sold this sugar that they would see to it that the sugar went into the hands of *bona fide* consumers and not the hands of dealers who would resell it.

Now, my recollection is that these parties regarding whom they consulted with us—but I do not know whether the name was ever mentioned—were *bona fide* consumers, manufacturers.

In the term “consumer,” I include a manufacturer of candy. The ultimate consumer in our idea was the housekeeper and the manufacturer of fruits, canned fruits; we had, of course, them always in mind, and the manufacturer of candies and soft drinks. We regarded them as consumers.

In general the rules and regulations were those that were laid down by the Food Administration, that sugar must go in a direct line from the refiner to the consumer; that if the sugar [215] was sold to a manufacturer, it would go, might go, from the refiner direct to the manufacturer; if it was sold to a wholesaler, it must go from that wholesaler direct to a consumer, or to a retailer, and from the retailer it must go into the hands of a consumer, and that there should be no resale by any person whom that sugar was sold as one in the chain of handlers.

In making the statement that there was no legal requirement, I am just quoting the rules and regulations that come under the unfair practices pro-

(Deposition of Mrs. Annette Adams.)

vision; and then, of course, there was the hoarding provision always in force. That was held to support us by our construction. Our construction was "more than reasonable needs for a reasonable period."

Q. Now, will you, especially while you are discussing that clause, then state what was the reason for the prohibition against resale against a manufacturer of candy?

Mr. FOX.—I want to object, because this witness has not stated that she herself authorized the insertion of that particular provision.

The WITNESS.—However, I only can say in that connection that we objected to the resale by any person who was not a seller.

Mr. FOX.—That is my point.

The WITNESS.—We only consented to this sale to the manufacturer on the understanding and assurance to us that this firm—that this was an ultimate consumer and not a seller.

Mr. FOX.—You have no objection to them selling it, in case they had more sugar, if business went down, and they sold the sugar for less than they paid for it?

The WITNESS.—Well, that was the thing that we had to prevent out there, the keeping of people from buying more sugar [216] than they needed to meet their needs. We did not want any candy manufacturer or soft drink manufacturer to get more sugar than they might have had under the general rules which were issued.

Mr. FOX.—The object of the Committee, you

(Deposition of Mrs. Annette Adams.)

had no objection to them securing a surplus where, on account of bad business, and in fact business did get bad, they secured a surplus, provided they would sell it for less than they paid for it?

The WITNESS.—That was not our idea, not the idea of our rule. Our rule was to prevent him from securing a surplus, not to prevent him from selling it, but our rule was to prevent him from getting it in the first place.

Mr. FOX.—My point is that you did not prohibit him the right to sell it cheaper, but that it should be in direct line—

The WITNESS.—(Interrupting.) Agreement with the refiners was that the refiners should not sell to persons who were not *bona fide* manufacturers.

Mr. BALLOU.—Q. Well, that is not my understanding.

A. That was the agreement.

Q. And that clause against resale, which was the design of that Act—

Mr. FOX.—Again I object.

The WITNESS.—Yes, that would be my impression.

Mr. FOX.—She did not draw this clause. She did not draw this clause, is my understanding.

The WITNESS.—I never saw this contract, and I do not recall ever having heard of the Continental Candy Company, but I am stating what the probabilities were and what limitations were put upon the Hawaiian Sugar Company in selling this sugar to the Middle West people. [217]

(Deposition of Mrs. Annette Adams.)

Mr. BALLOU.—Q. And this clause here, as a matter of fact, is in line with those prohibitions?

A. They are substantially the limitations we put upon them.

Mr. FOX.—I object to that—object on the ground that this witness has stated that she has not seen the clause, and that she is just stating the general rules and policy for the office.

Mr. BALLOU.—We are going to back it up with the testimony of Mr. Montgomery.

Mr. FOX.—I should hope that you are.

The WITNESS.—Mr. Montgomery and Mr. Miller are the persons who had direct contact. I know that Mr. Montgomery did, and my recollection is that Mr. Miller did.

On cross-examination the witness testified as follows:

I was present in San Francisco, and it was under my direction that these provisions of the Lever Act were carried out, the Act which was passed in 1917.

Q. And in carrying out the provisions of the Lever Act, you put into effect the provisions of the United States Food Administration insofar as those provisions of the United States Food Administration were necessary in the regulation of the United States Food Administration were promulgated in a set of rules issued for the guidance of the district attorneys; is that true?

A. Well, of course, the Food Administration

(Deposition of Mrs. Annette Adams.)

rules were in a sense in effect, were in a sense in effect.

We used them as a guide, and we required that the people should live up to those rules and regulations. Of course, if they wanted to engage in the sugar business, they had to secure a license. Licenses were issued from Washington, but, [218] of course, application for license renewals in many instances came thru us, and we recommended or refused recommendations that they be granted. Our duties then consisted especially in the enforcing of the provisions of the Lever Act. We really went a little further than that, because we had there the Fair Trade Board, which was a sort of an extra-legal organization which formulated policies, economic policies, policies which we considered economic policies, and we urged upon the public to follow them, and in certain activities we made them.

Q. If your Fair Price Board could formulate policies that they felt were a violation of the Lever Act or a violation of any other act, you didn't follow them?

A. Of course we did not formulate any that we thought were a violation of the law.

Q. I mean the Fair Price Board. A. Not for the Fair Price Board. They co-operated with me.

The witness continuing: Mr. Montgomery is not located there in San Francisco yet. He was just investigating for the Department. I cannot tell you just how much time he put in on the various

(Deposition of Mrs. Annette Adams.)

sugar interests. That was his particular business, to watch the sugar trade.

The witness' attention was here called to the Act of December 31, 1919, amending the original Lever Act, which she stated she recalled.

Q. I want to call your attention to the provisions with reference to the free distribution of sugar throughout the United States, and especially the abolishment of the policy of zoning, and the elimination of zones?

A. Yes; that is what I had reference to a while ago when I said that we attempted equitably to continue the allotment [219] that had been followed under the zone system.

Q. After December 31, 1919, you were? A. Yes, and we were this last spring.

Q. But you also at that time had to follow out the provisions of this Act, that sugar should be sold and circulated freely throughout the United States, didn't you?

A. I do not understand your question.

Q. My question is that the provision with regard to the distribution and circulation of sugar—

A. (Interposing.) We tried to distribute it freely and in as fair ratios as possible; in other words, keep anybody from hoarding.

Q. That is my point exactly. If a candy company bought sugar which they would ordinarily need in their business, and there came a slump in business, or for some reason that sugar was on hand so that they could not use it in their business

(Deposition of Mrs. Annette Adams.)

and they were willing to sell it cheaper than they paid for it, cheaper than the purchase price, there was no objection to them doing such a thing as that, was there?

A. Of course, you are assuming that they secured a license.

Q. I am assuming that they secured a license.

A. They could not sell it without a license.

Q. This provision of the contract that has been read to you providing what should be done—you did not draw that?

A. I did not.

The witness continuing: I never saw that before until I saw Mr. Ballou with it.

Q. And Mr. Ballou showed it to you. And, in your direct [220] examination, you merely referred to the general policies formulated at these conferences between yourself and Mr. H. Clay Miller, Mr. Montgomery, as to what the Department desired to be done; isn't that true, generally, I mean, rather than specific cases? A. No.

Q. General statement as to what was desired to be done and in doing that you carried out the rules and regulations previously promulgated by the Food Controller and subsequently re-promulgated by the Department of Justice, the Attorney General's office, which got the rules and regulations of the—

A. (Interposing.) Yes, Food Administration.

Q. Those were the rules you had to carry out, and you carried them out? A. Yes.

(Deposition of Mrs. Annette Adams.)

Q. And when you—

A. (Interposing.) Not those alone, but we endeavored, of course, to carry those out.

A. Oh, yes, we frequently received instructions from the Department of Justice.

Q. What I mean is that all of the rules and regulations that you attempted to carry out were issued by the Department of Justice?

A. Well, but we just helped to—

Q. (Interposing.) Were there any written orders issued by you? A. No.

Q. And, embodying in them the terms of this agreement?

A. No; we never issued any written instructions.

Q. Now, with regard to this question of resales within the trade, I call your attention to that provision, which is Rule 6:

“Rule 6. Resales within same trade prohibited, when—the licensee, when selling food commodities, shall keep such commodities moving to the consumer in as direct line as practicable [221] and without unreasonable delay. Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.” A. Yes.

Q. Under that provision of the regulations, under that item is where you carried out the policies that you spoke of in direct examination by Mr. Ballou that—

(Deposition of Mrs. Annette Adams.)

A. (Interposing.) Of course, we couldn't compel—

Q. (Interposing.) I am suggesting—

A. (Interposing.) We requested them only in so far as the law went, without the authority to compel them, but we did request them.

Q. Now, that provision, if you will note, says "within the same trade, without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer." That proviso provides that resales within the same trade are allowable when they are with reasonable justification. In view of such a provision, I might say as the case made whereby the sugar was resold for a lower price, a lower amount than it was purchased for, and I call to your attention that such a contract would be permitted.

A. But still we would be interested in knowing as to how that man got that much sugar because he had gotten more than his share of the sugar, and there must be something wrong away back when he got it, so that is interesting only from that standpoint, as to how he happened to get more sugar—

Q. (Interposing.) But, if he had more sugar than he needed in his business, and the volume of his business had fallen down to such an extent that he would not need it all, then you would allow him to resell the sugar? [222]

A. There were several instances where permission was requested from us to sell sugar that had over-accumulated.

(Deposition of Mrs. Annette Adams.)

Q. You say that you had no power to compel them to do these things. I did not get that exactly.

A. I say that many suggestions were made which we had no power to enforce. We made requests which we could not enforce. We could not compel the refiners to say, "We won't sell this person, that person, or the other person," but we could ask them not to sell to John Smith any more than John Smith was entitled to equitably, and that is what we did do. Any wholesaler in San Francisco would certainly have taken all of the sugar that the refiners could put out, and the refiners could have probably sold all of their sugar to Tillman & Boardman, or to any other wholesaler in the city, but we asked them to distribute it to all of the wholesalers who were legitimate wholesalers, in proportion to their trade.

Q. Now, if that—suppose that sugar company insisted upon selling sugar in violation of this policy?

A. Those that did gave it back when we found it out.

Q. You say you had no power, and that you could not compel them to comply with the rules and regulations that you imposed upon them?

A. Well, there is a section of the Food Control Act—

Q. (Interposing.) The Lever Act?

A. (Continuing.) —the Food Control Act. It is in that statute, and I think you can find it right there (indicating).

(Deposition of Mrs. Annette Adams.)

Q. Would you say that the Food Control Act compels them to—I mean is there no other manner?

A. None that I know of except the Food Control Act. Their license, of course, might be taken away from them and that is a pretty good weapon. [223]

Q. Pardon me, but that is a pretty good weapon. I dare say it was effective. You do not know who drafted—

A. (Interposing.) I have not any idea.

Q. (Continuing.) —those sections in that contract? A. No, I have not any idea.

Q. And you do not know whether the California & Hawaiian Sugar Refining Company placed those provisions in the contract, do you?

A. No, I have no recollection of that.

Q. Now, with regard to the California & Hawaiian Sugar Refining Company, do you know something about the character of their business? You do not know who they sell their sugar to, or who it is customary to sell their sugar to from Hawaii, and you only know that this went to Chicago?

A. My recollection is that this was rather a side deal, and that that is why it was taken up with us, because we pretty generally understood about the situation, about the sugar in that district, and the distribution of this Java came up and they consulted with us about it. That is my recollection.

Q. They did not consult with you personally?

(Deposition of Mrs. Annette Adams.)

A. No, I say "us," with the Department, with the representatives there.

Q. You personally had no knowledge with regard to the California & Hawaiian Sugar Refining Company's agreement?

A. I do not recall that I discussed it at all.

Q. Or with their attorneys?

A. No. I am sure I never did discuss it with their attorneys.

Q. I might say that Mr. Campbell is their attorney.

A. I do not recall ever having discussed it with Mr. Campbell, although I might possibly have done so and not remember it, because many times attorneys dropped into the office, [224] and when the South American sugars began coming in there were many questions arising constantly, and sometimes somebody would call me on the phone, and sometimes attorneys would drop into the office, but I have no recollection of Mr. Campbell seeing me.

On redirect examination the witness testified as follows:

Q. At the time the refiners consulted with Mr. Montgomery as to the special question of the sale of this Java whites, to some corporation, some manufacturing corporation in the Middle West, were you consulted about it by anyone?

A. Anyone you mean other than—

Q. (Interposing.) No, I mean do you recall discussing it with anyone?

A. I do not recall discussing it with anybody

(Deposition of Mrs. Annette Adams.)

except Mr. Montgomery and Mr. Miller. Now, I might possibly have discussed it with somebody else, but I do not remember.

Q. Why, you did not deal direct with the refiners, and that question was brought to you by Mr. Montgomery?

A. My recollection now is that I told Mr. Montgomery to go and discuss it with Mr. Miller. You know it is the same as the food regulations were. I do not remember the question of this contract arising. But the question we were concerned with primarily, that the refiners were concerned with, was that they could not make a sale unless it met with our approval. I do not know whether or not the California & Hawaiian Sugar Refining Company's business belongs to the business that I have just spoken of, refiners only, or whether they are engaged in other business. I have no recollection as to whether or not they did any more than this block, I mean by reselling. This discussion, as I recollect it, involved some 10,000 tons of sugar. It [225] involved one block—isn't that what you call it?

Q. One load, I suppose.

Mr. FOX.—That is considerably more than is covered in here. There are only 1200 tons in here. That is all we bought.

Mr. BALLOU.—I beg your pardon.

Mr. FOX.—We only bought 1200 tons.

Mr. BALLOU.—1250.

(Deposition of Mrs. Annette Adams.)

On recross-examination by Mr. FOX, the witness testified as follows:

Q. I am not sure that I have covered this, Mrs. Adams. In advising Mr. Miller and Mr. Montgomery with reference to this provision about reselling, you followed out—I do not know whether I asked this or not—you followed out this rule six about the resale in the same trade being prohibited; you followed out that rule?

A. We followed the general principles which probably had their incipency in the rule, but in any event, the general principles. They did not want the sugar sold to anybody that might buy it, might buy more than they needed, and we asked the refiners and the people whom we considered qualified to see that no man got more than his quota. In other words, that a proportionate amount of sugar was distributed and that there be no more than their ordinary business demanded. In other words, we wanted them not to sell to anybody that would hoard.

Q. That, then was the test; the test was not to sell to anybody that would hoard?

A. Not to sell to anybody that would hoard, and of course, in the manufacturing, that they should get no more than they needed for their legitimate manufacturing needs and that no buyer should buy more than his legitimate trade called for. [226]

Q. Now, then, this discussion about the matter and the manner in which this western company was broached to you, was any discussion had about the matter?

(Deposition of Mrs. Annette Adams.)

A. I do not understand; I do not know that any discussion was had about this mid-western company. The discussion had with me was about the 10,000 tons of Java sugar to be sold to some Eastern firm. Now, I do not say that I never discussed any particular firm. I never discussed any to my recollection, so I am not connecting this up, this firm. I would say that this discussion was with us with regard to their rights to sell portion of this Java sugar to Eastern manufacturers.

Q. And did they discuss their right to sell to some Eastern houses licensed to deal in sugar?

A. No. Manufacturing purposes is primarily what the discussion was with regard to it.

The witness, continuing: I do not recall whether they asked me whether the manufacturer was also licensed to deal in sugar. I do not recall that question being raised at all. We were asked with regard to selling the sugar to a manufacturing concern, and we regarded them as an ultimate consumer. Of course, we considered them as the ultimate consumer under those conditions. In my use of the word "eastern," I mean anything east of the Rockies, and that includes New York and Chicago. We were having a great deal of trouble in getting sugar enough to distribute on the Coast. Oregon and Washington were pleading for sugar, and the middle western dealers, sugar men, some of them were making perfectly exorbitant offers for sugar, and they were boosting the prices for themselves and for us, too, and we tried to discourage that kind of thing. [227]

The two letters of credit involved in the case, admitted to be correct, were offered and received in evidence, and photostat copies supplied in their place, and marked Defendants' Exhibit "K" and "L," and in photostat copies read as follows:

Defendants' Exhibit "K."

\$300000*

No. G. C. A6385 Capital and Surplus \$22,000.000
\$300,000.00 (U. S. Currency).

THE FIRST NATIONAL BANK OF CHICAGO.

Chicago, June 2, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Calif.

Gentlemen:

We hereby authorize you to value on The First National Bank of Chicago, at — sight for any sum or sums not exceeding in all Three Hundred Thousand Dollars (U. S. Currency) for account of Continental Candy Corporation, Chicago, Illinois, for cost of 1250 tons (2240 lbs. each)—99 test, 25 Dutch Standard @ \$19.85 per 100 lbs. FOB San Francisco, duty paid, to be shipped to Chicago, Ill. Shipment from Java, 250 tons in September and 1000 tons in October, 1920.

The Bills of Lading must be issued to the order of Shippers and endorsed in blank.

The Shipment must be completed and the Bill drawn on or before December 31, 1920, and sent to The First National Bank of Chicago, accompanied by Bill of Lading and abstract of Invoice, on receipt of which Documents the Bills will be duly honored.

The remaining Bills of Lading with certified ~~in~~voices and Consular Certificates must ~~be~~ sent by the Bank or Banks negotiating drafts to _____ for account of the ~~First~~ National Bank of Chicago and a ~~certificate~~ to that effect must [228] accompany draft.

We hereby agree with drawers, endorsers and *bona fide* holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored upon presentation at the counter of The First National Bank of Chicago.

This credit is confirmed and irrevocable.

Drafts under this Credit must bear upon their face the words:

Drawn under The First National Bank of Chicago.

Credit No. G. C. A6385—dated June 2, 1920.

If desired, drafts under this credit will be paid at the counter of the First National Bank, San Francisco, Calif.

Respectfully yours,

C. P. CLIFFORD,

V. P.

Countersigned—W. J. STRAND, A. Mgr.

Defendants' Exhibit "L."

GREAT LAKES TRUST COMPANY

Capital Stock, \$3,000,000

Surplus, \$600,000

110 So. Dearborn St.,

Chicago, Ill., June 1, 1920.

California & Hawaiian Sugar Refining Company,
San Francisco, California.

OUR COM'L CREDIT No. 1073.

Gentlemen:

For account of the Continental Candy Corpora-

tion of Chicago we hereby authorize you to draw on this bank at sight up to an amount not exceeding \$255,800.00 (two hundred fifty five thousand eight hundred dollars) to cover Dutch standard 25 refined sugar 99% test, to be shipped from Java during [229] September and/or October, 1920.

Your drafts are to be accompanied by plain invoices in triplicate and clean railroad bills of lading to order of shippers and blank endorsed, showing shipment from San Francisco to Chicago—the price to be \$19.85 per 100 lbs. F. O. B. San Francisco.

This credit will remain in force until December 31, 1920, and all drafts must be drawn and negotiated on or before that date.

We hereby agree with the makers, endorsers and *bona fide* holders of all drafts drawn under and in compliance with the terms of this credit that such drafts shall meet with due honor on presentation at our bank.

Yours very truly,
JOHN W. THOMAS,
Vice-President.

N. G. CHATTERTON,
Manager, Foreign Department.

P. S.—Drafts under this credit may be negotiated, if desired, with the Canton Bank of San Francisco.

N. G. C.

**Testimony of E. B. Montgomery, for Defendant
Sugar Refining Company (Recalled—Cross-ex-
amination).**

E. B. MONTGOMERY, recalled for cross-examination.

I did not tell the California & Hawaiian Sugar Refining Company to insert the provision against resale in any of their contracts for other sugars except this particular 10,000 tons. Mrs. Adams did not show any written order from the Attorney General's office in regard to this sugar. I received verbal notification from her.

The COURT.—Was there any reason in your own mind for differentiating between the contract to be followed in the sale [230] of the refined sugar and the contract to be followed in the matter of Java sugar? Was there anything?

A. No particular thing. The only difference is that with the domestic refined we were aware at all times of their margin, it was being allocated, and we were in direct contact with it, whereas with the Java we were not; it was going out of our territory, and we were afraid of resale. By going out of our territory I mean that it was going to Chicago.

Q. Didn't they ship any of their domestic refined to Chicago?

A. Yes, but you see, there was a stated price on the domestic, and there was no stated price on—that is, there was a stable price on the domestic. The refiner's price was always published, and on

(Testimony of E. B. Montgomery.)

this Java sugar there was no published price, and they used to charge all kinds of prices, and we were endeavoring to hold them down. I was afraid that the dealers would charge a higher price for this Java sugar than the refined product was bringing in the market. The reason for insisting on this provision was that there was a shortage of sugar and Eastern brokers were endeavoring to buy sugar in San Francisco, and were offering fancy prices for this Java sugar, for both spot and future, and we were endeavoring to prevent hoarding and profiteering. We had an arrangement whereby we could check up every sale, and would notify our Department in the city where it went, giving the names of the purchasers and amount purchased, and the price at which it was sold, and our Department in Chicago, for instance, would pick up that notice from us and would keep track of that sugar, and endeavor to hold them to a legitimate profit.

Q. You were afraid that some of these people in the Middle West would get some of this sugar, were you?

A. No, [231] we did not object to that, but we were afraid they would take our surplus and create a sugar famine here—that is, our surplus of Hawaiian.

Q. (By Mr. PARTRIDGE.) Do you know whether or not this Java sugar was used in households?

A. Of my own personal knowledge, no, I do not.

Q. What do you suppose it was going to be used for when out on the market?

(Testimony of E. B. Montgomery.)

A. A lot of it was used for manufacturing purposes, and I understood, I don't know this personally, that it was used in the Middle West for household purposes.

Redirect Examination.

Mr. McENERNEY.—Q. You knew, did you not, that that Java white was peculiarly adapted for manufacturing rather than for household use?

A. That was my understanding.

Q. And that if the manufacturers could be required to use it in the preparation of their commodities, to that extent the strain would be lifted from the sugar for domestic consumption?

A. Yes, that was the idea.

Mr. McENERNEY.—Now, Mr. Partridge, you stated this morning that you would waive the question of delayed shipments. Do I understand you that you would agree the shipments were in time?

Mr. PARTRIDGE.—Yes.

Mr. McENERNEY.—It is agreed that the shipments of this sugar were in time.

The defendant Sugar Refining Company then offered and there were received in evidence the two letters below mentioned dated November 30, 1920, which it was admitted had been served by the Continental Candy Corporation on the defendant Sugar Refining Company December 1, 1920. Each of these letters consisted of two pages. The letter which related to the contract [232] of May 14, 1920, was received in evidence as Defendant's Exhibit "M." The first page was marked "M-1" and

the second page "M-2." The letter which referred to the contract of May 18, 1920, consisting of two pages, was marked Defendant's Exhibit "N," and page 1 of the letter was marked "N-1" and page 2 "N-2." These letters read as follows:

Defendants' Exhibit "M."

November 30th, 1920.

California & Hawaiian Sugar Refining Co.,

230 California St.,

San Francisco, California.

Gentlemen:

You will please take notice, and you are hereby notified, that the contract entered into on the 14th day of May, 1920, between you and CONTINENTAL CANDY CORPORATION covering the sale by you of 750 tons (each 2,240 lbs.) 10 per cent. more or less, [233] of white Java sugar, at \$19.85, net cash, duty paid, landed weights, f. o. b. cars San Francisco, California 25 Dutch Standard, 99° polarization; 250 tons, 10 per cent. more or less, shipment from Java September, 1920, and 500 tons, 10 per cent. more or less, shipment from Java October, 1920, as subsequently amended to provide for delivery f. o. b. cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.

The said contract is so rescinded, cancelled, and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest

and policy, and because it is in violation of the anti-trust laws of the United States governing trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.

You are further notified and advised that said contract is unilateral and is, therefore, *nudum pactum* and wholly unenforceible.

Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.

Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.

You are further notified that said CONTINENTAL CANDY CORPORATION hereby rescinds, cancels and declares to be null and void the said entire contract of May 14th, 1920, because you have failed to comply with the material provision of said contract requiring shipment from Java in September, 1920, of 250 tons of said sugar.

You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and

advised not to value or draw under any of the Letters of Credit furnished you under said contract.

CONTINENTAL CANDY CORPORATION.

FRANK S. KING,

Assistant Secretary. [234]

Defendants' Exhibit "N."

November 30th, 1920.

California & Hawaiian Sugar Refining Co.,
230 California St.,
San Francisco, California.

Gentlemen:

You will please take notice, and you are hereby notified, that the contract entered into on the 18th day of May, 1920, between you and CONTINENTAL CANDY CORPORATION covering the sale by you of 500 tons (each 2,240 lbs.) 10 per cent. more or less, of white Java sugar, at \$19.85, net cash, duty paid, landed weights, f. o. b. cars San Francisco California, 25 Dutch Standard, 99° polarization; shipment from Java October, 1920, as subsequently amended to provide for delivery f. o. b, cars Crockett, California, is hereby rescinded, cancelled and declared to be null and void.

The said contract is so rescinded and cancelled, and declared to be null and void for the reason that the same, and the whole thereof, is illegal, fraudulent, null and void because it is in unreasonable restraint of trade and contrary to public interest and policy, and because it is in violation of the anti-trust laws of the United States governing

trade or commerce among the several states, or with foreign nations, and governing imports into the United States, and for the further reason that said contract is illegal and void in that it attempts to oust the courts of jurisdiction of any controversy concerning said contract.

You are further notified and advised that said contract is unilateral and is, therefore, *nudum pactum* and wholly enforceible.

Your attention is further called to the fact that said contract fixes no time for delivery to the buyer, either f. o. b. cars San Francisco, or, as later modified and amended, f. o. b. cars Crockett, California, and by reason of said fact said contract is terminable by either party on due notice.

Notice is hereby given you that said contract is terminated and cancelled before any delivery has been attempted by you to the buyer, either at San Francisco or at Crockett.

You are further notified that any steps taken by you for the enforcement of the said contract, or any part thereof, will be for your own risk, loss and damage, and you are especially notified and advised not to value or draw under any of the Letters of Credit furnished you under said contract.

CONTINENTAL CANDY CORPORATION.

By FRANK S. KING,

Assistant Secretary. [235]

The defendant Sugar Refining Company then offered and there were received in evidence the three drafts drawn by the Sugar Refining Company

under the two letters of credit for the aggregate amount of \$555,800, and by consent of counsel, a photostat copy of said three drafts on a single sheet took the place of the three original drafts, and said photostat sheet was marked Defendant's Exhibit "O," and was as follows:

Defendants' Exhibit "O."

\$111,160.00

San Francisco, Dec. 17th, 1920. No. 291A.

AT SIGHT PAY to the order of California and Hawaiian Sugar Refining Company, one hundred eleven thousand one hundred sixty 00/100 Dollars to pay for sugar shipped to order C. & H. S. R. Co. Notify Continental Candy Corporation as per attached endorsed Bills-of-Lading and invoice. Drawn under the First National Bank of Chicago Credit No. GC A6385, dated June 2nd, 1920.

Value received and charge to account of

CALIFORNIA & HAWAIIAN SUGAR
REFINING CO.

By P. A. DREW,

Third Vice-President.

By WARREN H. McBRYDE,

Secretary.

[Endorsed]: California and Hawaiian Sugar Refining Company. By P. A. Drew, Third Vice-President. By Warren H. McBryde, Secretary.
To The First National Bank of Chicago,
Chicago, Illinois.

\$188,840-00/100

San Francisco, December 22, 1920. No. 294A.

At SIGHT Pay to the order of California and

Hawaiian Sugar Refining Company, one hundred eighty eight thousand eight hundred forty 00/100 Dollars to pay for sugar shipped to order C. & H. S. R. Co. Notify Continental Candy Corporation as per attached endorsed Bills-of-Lading and invoice. Drawn under The First National Bank of Chicago Credit No. GC A6385, dated June 2nd, [236] 1920.

Value received and charge to the account of

CALIFORNIA & HAWAIIAN SUGAR
REFINING CO.,

By P. A. DREW,

Third Vice-President.

By WARREN H. McBRYDE,

Secretary.

[Endorsed]: California and Hawaiian Sugar Refining Company. By P. A. Drew, Third Vice-Pres. By Warren H. McBryde, Secretary.

To The First National Bank of Chicago,

Chicago, Illinois.

\$255,800-00/100.

San Francisco, December 22d, 1920. No. 295A.

AT SIGHT Pay to the order of California and Hawaiian Sugar Refining Company, Two hundred fifty-five thousand eight hundred 00/100 Dollars to pay for sugar shipped to order of C. & H. S. R. Co. Notify Continental Candy Corporation, as per attached endorsed Bills-of-Lading and invoice in triplicate. Drawn under Great Lakes Trust Co. Com'l. Credit No. 1073, dated June 1, 1920.

Value received and charge to the account of
CALIFORNIA & HAWAIIAN SUGAR
REFINING CO.

By P. A. DREW,
Third Vice President.

By WARREN H. McBRYDE,
Secretary.

[Endorsed]: California and Hawaiian Sugar
Refining Company. By P. A. Drew, Third Vice
Pres. By Warren H. McBride, Secretary.

To Great Lakes Trust Company,
Chicago, Illinois.

The defendant Sugar Refining Company then
offered and there was received in evidence the
original of the three orders whereunder the de-
fendant Sugar Refining Company directed the
banks to pay the three drafts to Walter B. Maling.
By consent of counsel, a photostat copy of said
three orders on a single sheet took the place of the
three original orders, and said photostat copy
was marked Defendant's Exhibit "P," and was as
follows: [237]

Defendants' Exhibit "P."

C. H.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING CO.

230 California St.,

San Francisco, December 22, 1920.

The First National Bank of Chicago, The First
National Bank of San Francisco, Acting as

the Agent, Representative and Correspondent of the First National Bank of Chicago, and First National Bank of San Francisco, Acting in Its Own Right.

Gentlemen:

Please pay our annexed draft, No. 291A for \$111,160. to Walter B. Maling, or to Walter B. Maling, Special Master, or Walter B. Maling, Special Master for the purposes specified in a certain Order of Temporary Injunction dated and filed December 8, 1920, in Case No. 579, in the Southern Division of the United States District Court for the Northern District of California, Second Division in Equity, of which Order of Temporary Injunction you have heretofore received a duly certified copy.

This is addressed to you jointly and to each of you severally.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY.

By WALLACE M. ALEXANDER,

President.

By WARREN H. McBRYDE,

Secretary

DYC*JB.

C. and H.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY,
230 California Street.

San Francisco, December 22, 1920.

The First National Bank of Chicago, The First
National Bank of San Francisco, Acting as
the Agent, Representative and Correspondent
of the First National Bank of Chicago, and
First National Bank of San Francisco, Acting
in Its Own Right. [238]

Gentlemen:

Please pay our annexed draft, No. 294A for
\$188,840, to Walter B. Maling, or to Walter B.
Maling, Special Master, or Walter B. Maling,
Special Master for the purposes specified in a certain
Order of Temporary Injunction dated and filed
December 8, 1920, in Case No. 579, in the Southern
Division of the United States District Court for
the Northern District of California, Second Divi-
sion in Equity, of which Order of Temporary
Injunction you have heretofore received a duly
certified copy.

This is addressed to you jointly and to each
of you severally.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY.

By WALLACE M. ALEXANDER,
President.

By WARREN H. McBRYDE,
Secretary.

DYC*JB.
C. and H.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY,
230 California Street.

San Francisco, December 22, 1920.

Great Lakes Trust Company, (Chicago), Canton
Bank, (San Francisco), Acting as Agent,
Representative and Correspondent of Great
Lakes Trust Company, (Chicago) and Canton
Bank, Acting in Its Own Right.

Gentlemen:

Please pay our annexed draft, No. 295A for
\$255,800.00 to Walter B. Maling, or to Walter B.
Maling, Special Master or Walter B. Maling,
Special Master for the purposes specified in a
certain Order of Temporary Injunction dated and
filed December 8, 1920, in Case No. 579, in the
Southern Division of the United States District
Court for the Northern District of California,
Second Division in Equity, of which Order of
Temporary Injunction you have heretofore re-
ceived a [239] duly certified copy.

This is addressed to you jointly and to each of
you severally.

CALIFORNIA AND HAWAIIAN SUGAR
REFINING COMPANY,
By WALLACE M. ALEXANDER.

President.

By WARREN H. McBRYDE,
Secretary.

The oath of office of Walter B. Maling, as special master to receive payment of the three drafts, read as follows:

(Title of Court and Cause.)

I, WALTER B. MALING, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of Special Master in the above-entitled suit. SO HELP ME GOD.

WALTER B. MALING.

Subscribed and sworn to before me this 22d day of December, 1920.

J. A. SCHAERTZER.

Deputy Clerk, U. S. District Court, Northern District of California.

[Seal of U. S. District Court, Northern District of California.]

[Endorsed]: Filed Dec. 22, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [240]

The defendant Sugar Refining Company then offered and there was received in evidence as a single exhibit two letters from the First National Bank of San Francisco to the Sugar Refining Company, dated June 8th and December 10th, 1920, and a photostat copy of both letters on a single sheet was substituted, by consent of counsel, in

place of the originals, and said photostat copy was marked Defendant's Exhibit "Q."

Copies of these letters are herein set forth at pages — to —, *supra*. [241]

The defendant Sugar Refining Company then offered and there were received in evidence two letters, one by the Canton Bank, dated December 1, 1920, and the other by the First National Bank of San Francisco, dated December 23, 1920, to the Sugar Refining Company, and by consent of counsel a photostat copy of these letters on a single sheet was substituted in place of the originals, and said photostat copy was marked Defendants' Exhibit "R," and the same read as follows:

Defendants' Exhibit "R."

CANTON BANK.

San Francisco, December 1, 1920.

California & Hawaiian Sugar Refining Co.,

230 California St.,

San Francisco.

Gentlemen:

Re: Great Lakes Trust Co. Credit No. 1073.

In review of the complex question which have lately arisen, we wish to advise you that we are no longer willing to negotiate drafts drawn against the above letter of credit.

We communicated with you regarding it, only as a matter of courtesy to our Chicago friends, the Great Lakes Trust Co. We therefore do not feel justified in deciding any technical questions

which might arise at the time drafts are presented.

Yours very truly,

E. F. SAGAR,

H.

Manager.

THE FIRST NATIONAL BANK OF

SAN FRANCISCO,

Capital \$3,000,000.

Surplus \$1,500,000.

San Francisco, December 23, 1920.

California and Hawaiian Sugar Refining Co.,

230 California Street,

San Francisco, Calif. [242]

Gentlemen:

Replying to your communication of the 22d inst., with which you have presented to us your sight draft, dated December 17, 1920, No. 291A, for \$111,160, and your sight draft, dated December 22d, 1920, No. 294A, for \$188,840, and certain documents accompanying the same, which are described in your said communication, we beg to say:

We make no objection to the sufficiency of these accompanying documents based upon the quality of the sugar therein described, or the date of shipment or place of origin, or with respect to the question whether the duty thereon has been paid, or in other respects, in consideration of the respective guaranties covering each and all of these matters which you have at this time given us.

Replying to your requests that we pay the above described sight drafts, we are willing to comply in all respects with the letter of credit issued by

the First National Bank of Chicago, No. GCA 6385, dated June 2, 1920, in accordance with the terms thereof, and within the time therein provided for payment of drafts drawn thereunder, but not otherwise, and we are willing at this time to pay said drafts but must decline to do so because we are enjoined and restrained from paying the same by a certain order of temporary injunction heretofore made on the 8th day of December, 1920, in a certain cause pending in the Southern Division of the United States District Court for the Northern District of California, Second Division, which cause is entitled "Continental Candy Corporation, a corporation, plaintiff, vs. California and Hawaiian Sugar Refining Co., a corporation, et al., defendants," and which cause is numbered 579 on the files and records of said court. [243]

Replying to your requests that the said above described sight drafts be paid to Walter B. Maling or to Walter B. Maling, special master, or Walter B. Maling, special master for the purposes specified in said order of temporary injunction, we have to say that the making of payment in such manner is not within the terms of said letter of credit, and that no obligations to make payment in such manner have been assumed by any party to said letter of credit, or by ourselves, and that the injunction in terms provides that we are under no such obligation by reason thereof. The reply in this paragraph contained to your communications addressed to the First National Bank of Chicago,

The First National Bank of San Francisco, acting as the agent, representative and correspondent of the First National Bank of Chicago, and the First National Bank of San Francisco, acting in its own right, is made jointly and severally by us in the several capacities described in said communications.

For the reasons above set forth we return to you herewith your said sight drafts and the accompanying bills of lading together with abstracts of invoice and public weigh master's certificates of weights and measures.

THE FIRST NATIONAL BANK OF SAN
FRANCISCO,

By J. K. MOFFITT,

Vice-President and Cashier. [244]

It was admitted that the Sugar Refining Company delivered to the First National Bank on or before December 17, 1920, the additional things that are called for in the quoted matter in Mr. Moffitt's letter of December 10, 1920, which letter is hereinabove set out in full.

It was further admitted that on December 22d, 1920, the defendant Sugar Refining Company presented to Canton Bank a draft drawn upon the Great Lakes Trust Company, with the necessary [245] shipping documents, all in due form, and that payment was refused by the Canton Bank.

It was further admitted that the defendant Sugar Refining Company on December 22d, 1920, delivered to the First National Bank of San Francisco, two drafts drawn with a letter, directing

payment of the drafts, to Mr. Maling, with all necessary documents, in appropriate form; that they examined them overnight, and on the following day, upon demand, and while they were in possession of those documents, payment was refused, and delivered to the defendant Sugar Refining Company their letter of December 23, 1920. It was further admitted that on December 17, 1920, the California & Hawaiian Refining Company delivered to Canton Bank an order for the payment of the money to Mr. Maling, appertaining to the particular draft drawn on the Great Lakes Trust Co., and that at the time of the presentation of the draft, Mr. Maling was then and there present, ready, able and willing to take payment. It was further admitted that the California & Hawaiian Sugar Refining Company presented the first of their two drafts for \$111,160, with all necessary and called-for papers, to the First National Bank on December 17, 1920, and were refused payment.

It was further admitted that in attendance at the Canton Bank on December 22, 1920, and at the First National Bank on December 22d and December 23d, 1920, were the President and Secretary of the California & Hawaiian Sugar Refining Company, clothed with power under a resolution of the Board of Directors, to execute any additional paper which either of the Banks might require in the facilitation of the payment of the drafts, or against any defect or objection thereto, which might be taken by them, in so far as they

could do so with the injunction as it [246] then stood.

The defendant Sugar Refining Company then offered and there was received in evidence the order of temporary injunction dated December 8, 1920, which read as follows: [247]

(EXHIBIT "C.")

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING CO., a Corporation, THE FIRST
NATIONAL BANK OF SAN FRANCISCO,
CALIFORNIA, a Corporation, and CAN-
TON BANK, a Corporation,

Defendants.

ORDER OF TEMPORARY INJUNCTION.

THIS DAY comes plaintiff by CHARLES LE-
ROY BROWN, its attorney, and also come the de-
fendant California and Hawaiian Sugar Refining
Co., by Donald Y. Campbell and Garrett W. Mc-
Enerney, its attorneys, and the defendant The First
National Bank of San Francisco, California, by
Cushing & Cushing, its attorneys, and the defendant
Canton Bank, by Henry U. Brandenstein, its at-

torney; and this cause coming on to be heard upon the application on the part of plaintiff for a temporary injunction pending the final hearing of said cause and until the further order of this Court, and upon the rule heretofore entered upon the defendants herein to show cause why a temporary injunction should not issue herein, which said rule to show cause was duly served upon said defendants, and each of them; and the Court having read and considered the bill of complaint herein, duly verified by affidavit, and the affidavits of Andrew A. Brown, L. Campiglia, Henry Clay Miller, Joseph C. Atwood, and C. K. McIntosh, presented on behalf of the defendant California and Hawaiian Sugar Refining Co., and filed [248] herein, and the affidavit of L. F. Cadogan, presented on behalf of the defendant The First National Bank of San Francisco, California, and filed herein, and the Court having heard arguments by the attorneys for all the parties present in court;

The Court, for the reason that it finds from the evidence so presented to the Court, without prejudice to any finding upon a final hearing of this cause, that in view of the contracts of sale of sugar entered into between plaintiff and the defendant California and Hawaiian Sugar Refining Co., on May 14, 1920, and May 18, 1920, and in view of the proofs respecting other facts, that there is probable cause to believe that the danger of plaintiff suffering irreparable loss and damage is immediate, because the defendant California and Hawaiian Sugar Refining Co. may at once proceed to collect all or part

of the purchase price of said sugar fixed by said contracts by valuing under a certain Letter of Credit issued on or about June 2, 1920, to said last mentioned defendant by The First National Bank of Chicago, drafts drawn under said Letter of Credit being by its terms payable over the counter of the defendant The First National Bank of San Francisco, California, up to the amount of Three Hundred Thousand and 00/100 (\$300,000.00) Dollars, and by valuing under a certain Letter of Credit issued on or about June 1, 1920, to said defendant California and Hawaiian Sugar Refining Co. by the Great Lakes Trust Company, of Chicago, Illinois, drafts drawn under said Letter of Credit being by its terms negotiable at the defendant Canton Bank of San Francisco, California up to the amount of Two Hundred Fifty-five Thousand Eight Hundred and 00/100 (\$255,800.00) Dollars, and because said banks, or some of them may at once accept and pay drafts so drawn under one or the other of said Letters of [249] Credit:

DOES HEREBY ORDER that the defendant California and Hawaiian Sugar Refining Co., its officers, agents, servants, employees and attorneys, or those in active concert or participation with it, be, and they and each of them are hereby, restrained and enjoined, pending the final hearing of this cause or until the further order of this Court, from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said defendant The First National Bank of San Francisco, California, and from taking

or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said defendant Canton Bank, and from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them from said First National Bank of Chicago, and from taking or receiving payment of any draft drawn or to be drawn under said Letters of Credit, or either of them, from said Great Lakes Trust Company, in so far as any such draft is or any part, or all, of the purchase price of and for any sugar covered by said contracts of May 14, 1920, and May 18, 1920, and from negotiating or assigning or making payable to any third person any drafts drawn under either of said Letters of Credit, except as may be necessary merely for presentation and demand for payment thereof, and that, in the event that the same be negotiated or assigned or made payable to any third person for the purpose specified, the said California and Hawaiian Sugar Refining Co. shall accept full responsibility for all acts of its endorsees and payees, who are also hereby enjoined to the same extent as the said last-named defendant is herein enjoined; and that the said defendant The First National Bank of San Francisco and the said defendant [250] Canton Bank, and each of them, and their respective officers, servants, agents and members, and all other persons acting with or aiding them, or assisting them or either of them, be, and they and each of them are hereby, restrained and enjoined pending the final hearing of this cause, or until the further

order of this Court, from paying under said Letters of Credit, or either of them, to or for the said defendant California and Hawaiian Sugar Refining Co. or to any assignee, payee, drawee or endorsee of said last-mentioned defendant, any part, or all, of the purchase price of and for said sugar covered by said contracts of date May 14, 1920, and May 18, 1920, and each or either of them.

IT IS HEREBY ORDERED that nothing herein contained shall be construed to enjoin the defendant, California and Hawaiian Sugar Refining Company from delivering to plaintiff, or offering to deliver to plaintiff, the sugar or any part thereof covered by said contracts of May 14, 1920, and May 18, 1920, or either of them, or from valuing or drawing under the aforesaid Letter of Credit issued by The First National Bank of Chicago on June 2, 1920, or for valuing or drawing under the aforesaid Letter of Credit issued by the Great Lakes Trust Company of Chicago, Illinois, on June 1, 1920, or from doing any act which it, the said California and Hawaiian Sugar Refining Company, is empowered or required to do, or which it has covenanted to do, or which it may be necessary for it to do, under said contracts of May 14, 1920, and May 18, 1920, or either of them, or which it is necessary or proper for it, the California and Hawaiian Sugar Refining Company, to do in order to comply with the terms of the Letters of Credit issued as aforesaid by The First National Bank of Chicago and the Great Lakes Trust [251] Com-

pany of Chicago (Illinois), or to comply with the terms of either of said Letters of Credit.

IT IS FURTHER ORDERED that in the event any draft or drafts be presented by the defendant California and Hawaiian Sugar Refining Company, a corporation, to the defendant, The First National Bank of San Francisco, California, a corporation, or to the defendant, Canton Bank, a corporation, for payment under the aforementioned Letters of Credit, or either of them, that nothing herein contained shall be deemed to enjoin the said defendant, The First National Bank of San Francisco, California, or the said defendant, Canton Bank, or either of them, from paying the amount of said draft or drafts to Walter B. Maling, who is hereby appointed Special Master for this purpose as depository to be held by him subject to the final decree to be entered herein.

IT IS FURTHER ORDERED that in the event any draft or drafts be presented by the defendant, California and Hawaiian Sugar Refining Company, a corporation, to The First National Bank of Chicago, or to Great Lakes Trust Company of Chicago, Illinois, or to either of them, for payment under the aforementioned Letters of Credit, or either of them, that nothing herein contained shall be deemed to enjoin the defendants, or any of them, from requesting said First National Bank of Chicago or the said Great Lakes Trust Company of Chicago, Illinois, or either of them, to pay the amount of said draft or drafts to Walter B. Maling, Special

Master as aforesaid, to be held by him subject to the final decree to be entered herein.

IT IS FURTHER ORDERED that nothing contained in the two paragraphs last preceding shall be construed to require any of said banks to make any such payment to said Walter B. Maling, as Special Master. [252]

AND IT IS FURTHER ORDERED that a writ of injunction issued in accordance herewith upon said plaintiff filing herein security in the sum of Four Hundred Thousand (\$400,000) Dollars conditioned upon the payment of such costs and damages as may be incurred or suffered by any party hereto who may be found to have been wrongfully enjoined or restrained hereby, and also conditioned upon the payment of such damages as may be sustained by any party hereto by reason of this injunction being found to have been erroneously or improvidently granted, with security to be approved by the Court. It is further ordered that the temporary restraining order made and entered herein on December 1, A. D. 1920, be extended and continued in full force and with the same effect as when granted so far and only so far as it restrains the defendant from the commission of acts in respect of which they and each of them are hereinabove enjoined, until the filing and approving of said security, provided said security be filed and approved herein within ten days from this date, and that when said security be filed and approved it be in lieu and substitution of the security given on said restraining order and filed herein on De-

ember 1, 1920. It is hereby further ordered that except as aforesaid the said restraining order of December 1, 1920, is hereby vacated and discharged; and, if said security in the sum of Four Hundred Thousand (\$400,000) Dollars be not given within ten days from this date, that said restraining order of December 1, 1920, shall be wholly vacated and discharged.

The Court imposed, as a condition to the entry of this order, that the plaintiff should consent that the defendant California and Hawaiian Sugar Refining Co. may sell at the market any and all of the sugar covered by said contracts of May 14, 1920, [253] and May 18, 1920, and plaintiff in open court consented to the said condition; but nothing herein contained shall be deemed to require said last-mentioned defendant to pursue said course or to sell said sugar.

IT IS HEREBY FURTHER ORDERED that the defendant California and Hawaiian Sugar Refining Co. be required to file herein its answer to the bill of complaint on or before December 17, 1920, and that this cause be set for hearing on December 27, 1920.

The plaintiff in open court has waived, as a condition to the entry of this order, the right to use the length of time for the taking of depositions allowed by the laws of the United States and the equity rules of the Supreme Court of the United States, but has reserved the right to take such depositions as it may need when it employs all possible dispatch and has also reserved the right to

ask for a continuance of the hearing of said cause on December 27, 1920, if after using all such possible dispatch it has not been able by said last-mentioned date to obtain certain depositions needed by it for the presentation of its cause of action, and for meeting any defense which may be raised by the answers of the defendants hereto, and the aforesaid setting of said cause is subject to said reserved rights of said plaintiff.

DONE IN OPEN COURT this 8th day of December, 1920.

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Dec. 8, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [254]

The defendant Sugar Refining Company then offered and there was received in evidence the bond of the National Surety Company given upon the obtainment of the order of temporary injunction dated December 8, 1920, and the same read as follows: [255]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY—No. 579.

CONTINENTAL CANDY CORPORATION, a
Corporation,

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING CO., a Corporation, THE FIRST
NATIONAL BANK OF SAN FRANCISCO,
CALIFORNIA, a Corporation, and CAN-
TON BANK, a Corporation,

Defendants.

BOND ON ISSUANCE OF TEMPORARY IN-
JUNCTION.

WHEREAS after due proceedings had in the above-entitled action, the above-entitled Court did, on the eighth day of December, A. D. 1920, make, file and enter herein its order of temporary injunction against said defendants California and Hawaiian Sugar Refining Co., a corporation, The First National Bank of San Francisco, California, also a corporation, and Canton Bank, also a corporation, upon the plaintiff filing herein a bond in the sum of Four Hundred Thousand (\$400,000) Dollars, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party hereto who may be found to have been

wrongfully enjoined or restrained thereby, and for the payment of such damages as may be sustained by any party hereto by reason of said injunction being found to have been improvidently granted;

NOW, THEREFORE, in consideration of the premises and of the issuance of said order of temporary injunction, the undersigned, National Surety Company, a corporation organized [256] and existing under and by virtue of the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake in the sum of \$400,000 and promise that in the event that it shall be finally judicially determined herein that any of the defendants herein have been wrongfully enjoined or restrained by said order of temporary injunction, or that said order of temporary injunction was erroneously or improvidently granted against the said defendants, or any of them, the plaintiff shall pay to said defendants, and to each of them, any and all costs or damages which said defendants, or any of them, may have incurred or suffered by reason of the making and entering of said order of temporary injunction, not to exceed, however, in the aggregate, the aforesaid sum of \$400,000, and the undersigned does hereby further agree that in the event it shall be herein finally judicially determined that any of said defendants have been wrongfully enjoined or restrained, or that said order of temporary injunction was erroneously or improvidently granted as to any of said defendants, the above-entitled Court may, upon notice to the un-

dersigned of not less than ten days, proceed summarily in the above-entitled suit to ascertain and determine the amount of costs and damages to which said defendant or defendants may be entitled by reason of the issuance of said order of temporary injunction, and which the undersigned is bound to pay on account thereof, and may render judgment against the undersigned for said amount and award execution against it to enforce said judgment.

Sealed with our seal and dated this 8th day of December, A. D. 1920.

NATIONAL SURETY COMPANY,
[Seal] By FRANK L. GILBERT,
Attorney in Fact.

Approved:

FRANK H. RUDKIN,
United States District Judge.

[Endorsed]: Filed Dec. 8, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [257]
State of California,
City and County of San Francisco,—ss.

On this 8th day of December, in the year one thousand nine hundred and twenty, before me, John McCallan, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the Attorney of Fact of the National Surety Company, the cor-

poration described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as Principal and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this Certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California. [258]

The defendant Sugar Refining Company then offered and there was received in evidence pages 180 to 185 of the Attorney General's Report for 1920, which read as follows: [259]

ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR YEAR 1920.

Pages 180 to 185.

16. HIGH COST OF LIVING.

(180) When the last annual report was rendered, the division in charge of enforcing the Lever Food Control Act had just been organized. While effective action had been taken under sections 6 and 7 of the food-control act, the amendments to said act had been but recently passed (Oct. 22, 1919), and it remained for this division to organize adequate

means of enforcing the important amendments providing a penalty for profiteering.

It has been explained how the fair-price organizations were brought into existence, and it now remained to strengthen and organize their work in order that they might effectively co-operate with the district attorneys in the enforcement of the act. Profiteering was defined in the act as "the making of an unjust or unreasonable rate or charge" or "conspiracy to exact excessive prices." This broad and general definition required more specific application and definition. The fair-price commissioners were therefore intrusted with the duty of conferring with the trade and arriving at rates, charges, and profits which would be mutually agreed upon as just and reasonable to the trade and to the consumer.

They were also intrusted with the duty of organizing fair-price committees in their respective States. In general it was not found advisable or necessary to re-create the large and extension organizations built up by the Food Administration during the war. In most instances States were subdivided into districts, with fair-price committees functioning in each. [260]

In the organization of these committees care was taken to have all interests represented and to have the consumers always in the majority on fair-price committees. These bodies then met whenever necessary to consider the matter of prices and costs for the triple purpose of advising dealers as to what might be considered as reasonable prices;

second, for the education of the public as to reasonable prices and practices; third, as assistants to the United States attorneys and bureau agents in prosecutions of cases being investigated for prosecution.

It was also apparent that one of the principal circumstances which facilitated profiteering and would render any effort to curb it nugatory was the excessive extravagance that was being displayed by the community at that time. Therefore an intensive campaign was organized to combat this extraordinary extravagance.

The Division of Women's Activities had for its specific aims curtailment of buying, directing of buying energy to necessities, (181) elimination of waste, running of the home on an efficiency basis, and the use of the Department of Justice "Complaint card."

In order to reach a considerable number of women an organization was necessary. It was thought that much time could be saved by working through schools and other systematized groups, such as clubs, already functioning. These activities were co-ordinated by a chairman appointed in each State to work directly with the central office in Washington. The State organization plan was sent from here and all States were organized in the same manner as follows:

An advisory board composed of a member from each of [261] the following: Fair price committee, clubs, home economics (Department of Agriculture), thrift, schools, publicity, Americanization.

County of district chairmen appointed by the above board, these chairmen forming the State executive committee which appointed all chairmen for cities, towns, etc.

The local chairmen appointed committees as follows: Women's organizations; educational institutions, (a) public, (b) private; churches; publicity, (a) press, (b) speakers; complaint; special.

Thirty-eight pamphlets on various subjects, of which over 1,000,000 were distributed, were compiled by the Women's Division. The following examples will give an idea of their contents:

A platform advocated for adoption to all women's clubs,—

Teach: "More production, more conservation, and more responsibility to the Government," three points which were desired to be taught through our organization.

Do's and dont's on wearing apparel. Suggestions for the care of clothing and for the choosing of appropriate materials and styles when buying.

Do's and dont's on food. Suggestions to aid in saving time and money in purchasing and also in serving food.

Do's and dont's on income. Suggestions for the saving of money through intelligent investments and sane, wise buying.

A letter received from Henry van Dyke expressing his views on the high cost of living, its causes and remedy.

An experience pool in clothing values, a practical way to fight the high cost of living, a sugges-

tion contributed by the Committee on Standardization of Textile Fabrics of the American Home Economics Association.

Information of value for testing, selecting and caring for materials suitable for coats, suits and dresses for ladies and misses. Compiled with the assistance of the Prince School for education for store service. [262]

A bibliography of books on clothing selection and construction, of interest and assistance to all women.

Duties of the committee on complaints were outlined in this pamphlet with instructions as to how to put cards in the hands of the people and to collect them, after having been filled in with desired information, and then how to turn them over to the proper authorities.

“What can our club do to help?” Practical things that a club might do to bring about the reduction of prices.

An outline for the study of clothing budget giving the purpose the arrangement for meetings and programs.

(182) Reasons for using a budget, to encourage the use of the budget by a simple, concrete explanation.

A speech prepared for the use of local speakers, outlining the causes of high prices, the extravagant living of the people of America of to-day, and our desire to remedy these existing conditions.

A bulletin giving figures showing amounts spent

on luxuries in the United States and how they affect our present high cost of living.

Very good suggestions coming in from various State chairmen throughout the country were sent into this office which played the part of a willing clearing house for these and many other good economic ideas so that all might benefit.

Three efficient speakers went out to stimulate interest and create enthusiasm in the work. Innumerable newspaper and magazine articles appeared indicating the results accomplished by the organizations, and thousands of requests came in for literature bearing on the subject of the high cost of living. Many leading magazines published articles on our work from time to time. Moving-picture houses used our slides continually, advertising our aims, and encouraging sane, wise buying. Large meetings were held of the factory and telephone girls, and our speakers presented our work and secured the co-operation of all employees. Large exhibits in nearly all organized States were held at fairs during the fall, showing made-over garments, also home-made dresses and hats trimmed by girls at the various classes held during the summer, preserved fruit without sugar, and other work done by the women in their endeavor to bring down [263] prices. All during the summer and fall months curb, neighborhood and school markets were carried on with great success in many States, and the producer was able to sell his goods direct to the consumer at a great saving.

Resolutions were passed by organizations and clubs all over the country advocating simple living and conservation and co-operation with the Department of Justice in its efforts. "Patch 'Em and Wear 'Em" clubs were formed, and the old clothes and overall and gingham dress movements were all outgrowths of the general trend of the public thought.

Prior to the passage of the amendment to the Lever Act the original sections of the same had been rigorously enforced. This had resulted in largely discouraging hoarding and manipulation of the market. The seizures and prosecutions referred to in the last report had made it exceedingly precarious for the speculators. There still, however, remained great abuses in the taking of unreasonable profits, and immediately a penalty for profiteering was provided vigorous measures were taken to insure rigorous enforcement. Letters and telegrams were transmitted to all United States district attorneys explaining the nature of the act and the policies of the department (183) relating thereto and directing them to give precedence to this character of cases. This resulted in effective activity on the part of various district attorneys.

There have been 1,049 prosecutions instituted under the profiteering section alone, and in all 2,016 cases under all sections of the Lever Food Control Act. There have been 99 cases under section 4 in which convictions have been obtained.

The following table shows the number of prosecutions instituted under the different sections of the Lever Food Control Act: [264]

Section 4. CASES IN WHICH SENTENCES HAVE BEEN IMPOSED.					Section 5.	Section 6.	Section 9.	Section 15.	Section 25.	Total.
Sugar	49	Sugar	5	Sugar	6	71 Coal	2			
Meat	2	Flour	1							
Wearing apparel	20									
Potatoes	1									
Fruit	1									
Unknown commodities	2									
Section unknown	24									
Total	99									
INDICTMENTS.										
Sugar	296	Sugar	12	Sugar	20		1	824 Coal	9	
Meat	51	Bacon	2							
Wearing apparel	53	Food produce ..	2							
Fuel	148									
Unknown commodities	108									
Restaurants	11									
Flour	1									
Bread	11									
Potatoes	9									
Butter	1									
Feed	1									
Beans	1									
Milk	3									
Foodstuffs	39									
Cotton	1									
Section unknown	36									
Total	771									
ARRESTS.										
Sugar	110	Sugar	2	Sugar	2	6 Coal	2			
Meat	4									
Wearing apparel	8									
Fuel	20									
Unknown commodities	23									
Foodstuffs	1									
Drugs	1									
Flour	1									
Section unknown	11									
Total	179									

(184) At the outset of the campaign 8 or 10 of the biggest corporations of the country were subjected to investigation. The results recently received and analyzed have been prepared for presentation to the courts. The most striking illustration of this phase of the department's work is the American Woolen Co. After months of exhaustive research, this company was indicted by a Federal grand jury. (The indictment was demurred to on the ground that the product of this company, woolen cloth, was not an article of wearing apparel within the meaning of the law, which demurrer was sustained by the Federal judge and is now appealed to the Supreme Court.)

The publicity attendant upon this indictment and the facts thereby revealed caused, according to the admission of the company itself, a tremendous cancellation of orders. They used this as a pretext for shutting down their plants for about a month, but then reopened and announced a reduction varying from 18 to 20 per cent with no corresponding reduction in wages.

Investigations have been made particularly of the following specific interests: the sugar industry included cane and beet sugar and growing conditions in Cuba. An investigation of this latter phase of the sugar industry is being made by a fair-price commissioner who made a trip to Cuba for this purpose. Cane sugar producing and manufacturing interests in both Louisiana and Texas were also carefully investigated. Investigations of two large producing companies, the American Sugar Refining

Co. and the Utah-Idaho Sugar Co., resulted in the return of indictments which are now pending.

An investigation was undertaken of different branches of the leather industry, including the various phases of leather manufacture from the production to the finished product. [266]

A most exhaustive investigation was made of the clothing manufacturing industry by one of the fair-price commissioners thoroughly conversant with conditions in the trade. This investigation and action taken based upon it was largely instrumental in breaking down the effort to maintain prices by means of the so-called price guaranty.

A general investigation was made of hotel and restaurants by means of questionnaires. This investigation and the activities of our fair-price commissioners was instrumental in causing the revision of menu prices in many cities.

A thorough investigation of the meat-packing business resulted in the indictments of the following packers: Morris & Co., Wilson & Co., Armour & Co., Swift & Co., and the Cudahy Packing Co.

When the work of this division was begun the country was experiencing one of the most rapid rises in prices and living costs in its history. This movement continued for some time, gradually (185) slackening, and the turning point was reached about May, 1920. Since that time prices of practically all of the necessities within the purview of this act have consistently declined.

The criminal law is at best an imperfect instrument with which to deal with such a situation. The

purpose of the department has been to enforce it in such a manner as would be consistent with sound economics. To this end the fair-price committees functioned in such a manner as to bring the interpretation of the act in accordance with sound business principles; the Women's Activity Division functioned to reduce consumption; and criminal penalties were enforced to prevent profiteering and excessive speculation. [267]

Thus it will be clearly seen that the work of the department has not retarded the operation of the economic laws but has accelerated and aided them in bringing the country back to normal conditions.

An important factor has been the action of the fair-price commissioners in inducing patriotic merchants to effect reductions in prices.

Another phase of the department's campaign which is just beginning to be felt is its investigation of the larger corporations. The public little appreciates the practical difficulties of such investigations. It is a simple matter to detect a corner groceryman in the act of profiteering. A purchase at his store, a review of his books, and the department's agent can readily determine whether there has been a violation of the law. The investigation of a big corporation means the employment of numerous accountants, auditors, and agents for many months, careful analysis of the evidence secured, and exhaustive presentation of a vast array of figures to the grand jury. [268]

The defendant Sugar Refining Company then offered and there was received in evidence five telegrams, three addressed by the Sugar Refining Com-

pany to the Great Lakes Trust Company, and two addressed by the Great Lakes Trust Company to the Sugar Refining Company. It was admitted that these telegrams were sent. The telegrams under one exhibit number were marked Defendant's Exhibit "S." They are set forth herein at pp. — to —, *supra*. (The cross-reference herein is to pp. 6 and 7.)

The defendant Sugar Refining Company then offered and there was received in evidence three letters written to it by the Canton Bank dated August 13th, August 24th and October 4, 1920. A photostat copy of these three letters on a single sheet was marked Defendants' Exhibit "T," and said sheet read as follows:

Defendants' Exhibit "T."

CANTON BANK

San Francisco, August 13, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco.

Gentlemen:

Re: Commercial Credit No. 1073 Issued by
The Great Lakes Trust Co., Chicago.

Kindly be advised that we are in receipt of a telegram from the Great Lakes Trust Co., Chicago, with reference to the above credit, which reads as follows:

"Refer our letter June first credit ten seventy-three you may accept shipping documents covering C. & H. Standard Granulated Sugar instead of Java Sugar other conditions unchanged."

Assuring you of our pleasure to negotiate your documentary bills drawn in compliance with the terms of this credit, we remain,

Yours very truly,

L. V. RAY,

LVR/H.

Accountant. [269]

CANTON BANK.

San Francisco, August 24, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco, Cal.

Re: Commercial Credit No. 1073 Issued by the
Great Lakes Trust Co., Chicago.

Gentlemen:

Kindly be advised that we are today in receipt of a letter from the Great Lakes Trust Co., Chicago, Ill., stating that the shipment relating to the above-mentioned Letter of Credit will be F. O. B. Crockett, Calif., instead of San Francisco.

Assuring you that we shall be pleased to negotiate your documentary bills when drawn in compliance with the terms of this credit, we are.

Yours very truly,

L. V. RAY,

LVR/C.

Accountant.

CANTON BANK.

San Francisco, October 4, 1920.

California & Hawaiian Sugar Refining Co.,

San Francisco.

Gentlemen:

Re: Commercial Credit No. 1073 Issued by
the Great Lakes Trust Co., Chicago.

Kindly be advised that we today received from the Great Lakes Trust Co., the following telegram:

“Refer our letter June first credit ten seventy-three California and Hawaii Sugar cancel instructions per our telegram August eleven and pay against documents originally specified which should include certificate inspection of Harry Sheramsky three hundred ten California Street, San Francisco notify beneficiary.” [270]

In compliance therewith we have cancelled the instructions contained in our letter of August 13, 1920, and have amended the conditions of the credit to comply with the aforesaid telegram.

Assuring you of our pleasure to negotiate your documentary bills when drawn in compliance with the terms of this credit, we remain,

Yours very truly,

L. V. RAY,

Accountant.

LVR/H.

The COURT.—The Canton Bank has never answered in this case, has it?

Mr. McENERNEY.—No. Mr. Brandenstein was here this morning.

Mr. BRANDENSTEIN.—I simply appeared for them, really in the nature of a bystander in the matter.

The COURT.—The First National Bank has answered, I see.

Mr. BRANDENSTEIN.—We have not. I would like to have one admission, and that is this, that this letter was sent before the injunction was issued. That is a fact. It happens to bear the same date.

(The letter here referred to is the one dated December 1, 1920, written by the Canton Bank to the defendant Sugar Refining Company, and is hereinabove set forth (herein p. 291 et seq.) as one of the documents constituting Defendants' Exhibit "R.")

Mr. McENERNEY.—I will admit it on your statement, but I want to know how that happened.

Mr. BRANDENSTEIN.—Simply because they had received [271] these instructions from the bank. Mr. Charles Le Roy Brown was down inquiring at the bank.

Mr. McENERNEY.—Where is the telegram from the Great Lakes to them of which you spoke?

Mr. BRANDENSTEIN.—That, I think is in the possession of the bank.

Mr. McENERNEY.—Will you produce that so that we can supply it?

Mr. BRANDENSTEIN.—Yes.

It was admitted by Mr. McEnerney that the letter of the Canton Bank dated December 1, 1920, was written and sent to the California & Hawaiian Sugar Refining Company before the complaint was filed, although the complaint was filed on the same day, but was after the rescission.

It was admitted that Mr. Hoover's appointment was on August 10th, 1917, and that on October 3, 1917, the California & Hawaiian Sugar Refining Company was licensed as a dealer in sugar, and ever since has been, and that in 1917 the Sugar Refining Company came to know of Rule 6,

regardless of what it meant, and has ever since been and still is possessed of that information.

Mr. RICHTER.—The First National Bank of San Francisco has filed an answer which is largely a statement that defendant is without knowledge. It does, however, contain some affirmative allegations. Some of those have already been proved. With respect to those which have not been, I will ask counsel whether proof of those matters is admitted.

Mr. McENERNEY.—What do you understand by “the others”? We admit that the letter from the First National Bank of Chicago was received as alleged. [272]

Mr. RICHTER.—That is, the letter dated June 8, 1920, addressed by the First National Bank of Chicago to the First National Bank of San Francisco, a copy of which is set out in the answer?

Mr. McENERNEY.—June 4, is it not?

Mr. RICHTER.—June 8 is the date of receipt. It is dated June 3, received, I believe, June 8.

Mr. McENERNEY.—Yes, the letter is admitted.

It was further admitted upon the suggestion of Mr. Richter that the allegation in the answer of the First National Bank, that the letter of credit was changed in minor respects so as to provide that shipments should be f. o. b. Crockett instead of f. o. b. San Francisco.

The defendant Sugar Refining Company here rested, and there was no rebuttal evidence offered by the complainant, except the above mentioned deposition of J. G. Weatherly. This deposition was

(Deposition of J. G. Weatherly.)

taken on behalf of the complainant in Washington, D. C., on December 21, 1921, before Berenice Broy, a notary public in and for the District of Columbia, and is as follows:

Deposition of J. G. Weatherly, for Complainant.

Under direct examination by Mr. COX, the witness testified:

My name is J. G. Weatherly. I live at 1414 North Carolina Avenue, N. E., Washington, D. C. I am a lawyer. Approximately during the last year I was employed by the Department of Justice. From November 27, 1919, to November 6th, 1920, I had charge of and personally directed the Fair Price or price organizations throughout the United States. Those Fair Price organizations included Fair Price Commissions. I do not recall that we had anything known as a Fair Trade Commission, but all organizations functioning with a purpose of arriving at fair [273] margins of profit under the Lever Act were under my jurisdiction. There were officers superior to me in the work connected with Fair Price Commissions throughout the United States. Howard Figg was my immediate superior; his title is Special Assistant to the Attorney General. He had delegated to him the enforcement of the Lever Act, and all of the phases and duties in connection with the work of the enforcement of the Lever Law. In my capacity as assistant in charge of the Fair Price Commissions throughout the United States, I had correspondence with the va-

(Deposition of J. G. Weatherly.)

rious Fair Price Commissioners and Fair Price Commissions throughout the country. The method of the constitution of the Fair Price Commissions generally followed was, first, to select the State Fair Price Commissioner, and he was selected by consultation, usually, with the governors of the States, the United States Attorneys, and oftentimes, the old Food Administrator, and when we could get them in accord on a suitable person for the Fair Price Commissioner, the appointments were made by the Attorney General. Then the Fair Price Commissioner formed his subcommittees, usually building them up with representatives of the various branches of industry and also with representatives of the public. It was usually these committees were composed of a representative of the retail grocers, retail dry-goods dealers, manufacturers, labor, the general public, and, quite often, the farmers—representatives of the farmers. The Fair Price Committee at California was charged with the duty of reaching conclusions, the duty of deliberating as to fair margins of profit on the necessities of life, as defined by the Lever Act. Sugar was one of those necessities, or so considered by the Department of Justice, in view of the fact that it was presumed to be a food. The chairman of the Fair Price Committee in San Francisco was H. Clay [274] Miller. The Fair Price Committee at San Francisco did not fix the fair price for sugar in May, 1920. At that time the fixing of the fair price for sugar, or any other commodity under the

(Deposition of J. G. Weatherly.)

Lever Act, was a power not possessed by any Governmental agency.

Mr. BALLOU, for Defendant California & Hawaiian Sugar Refining Company: I object to that as a conclusion of law.

The Department of Justice took the position that a fair margin of profit was the only element of price, all that could be established by Fair Price Committees, or by any other agency which the Department of Justice might use in such matters; but sugar was a commodity which, so far as the margins of profits or prices were concerned, was always handled direct from Washington by the Department of Justice, the Attorney General's Office, and was under the direction of Howard Figg, and myself as associate.

Q. Now, did you have any correspondence with the Department, did the Department have any correspondence with Mr. H. Clay Miller about, in May, 1920, that you remember, with reference to fixing the margins of profit with reference to fixing the trade practices in sugar business?

A. There was a discussion with the San Francisco Fair Price Committee, as to whether that Committee should be granted very great powers in the matter of the distribution of sugar and the price of sugar, and all matters connected with dealing in sugar.

Q. What conclusion did they come to about that?

Mr. BALLOU.—I object to that question as calling for—not the best evidence. The correspondence

(Deposition of J. G. Weatherly.)

would be the best evidence. The correspondence should be produced and I object if it is not. [275]

Mr. FOX.—What conclusion did the Department come to with reference to this discussion?

The WITNESS.—I personally—

Mr. BALLOU.—Same objection.

The WITNESS.—(Continuing.) Handled the discussion with the California—the San Francisco Committee—and in connection with the other officials associated with me in the work we denied the request of the San Francisco Committee that it have any greater powers than those possessed by any other fair price committee for the reason that the Department of Justice did not consider that it had any powers over the economic phases of the matters covered by the Lever Law, the Lever Law being purely a criminal statute.

Mr. BALLOU.—I object to the answer and ask that it be stricken out as not being the best evidence and think that the correspondence had better be quoted.

I have examined the files of the Department of Justice, at the request of Mr. Fox, recently with reference to this, with reference to any correspondence with the San Francisco Fair Price Committee. I find correspondence with the San Francisco Fair Price Committee, or with officials of that Fair Price Committee, relative to this matter. My answer to your previous question as to what the conclusion of the Attorney General's Office was upon the request of Mr. H. Clay Miller for general authority to fix

(Deposition of J. G. Weatherly.)

prices was based upon the correspondence had with H. Clay Miller, and which I have examined recently. The request of the San Francisco Committee is embodied in a letter addressed to the Department of Justice, addressed to the Attorney General, by H. Clay Miller, under date of May 18, 1920, and a reply thereto which is substantially as heretofore answered by me, as embodied [276] in a letter addressed to H. Clay Miller under date of May 27, 1920.

Mr. BALLOU.—I object to the answer and ask that it be stricken out on the ground that in so far as it purports to state the contents of the correspondence, on the ground that it is not the best evidence.

The correspondence that I have just referred to I would not consider among the public records of the Department of Justice, or more probably perhaps not a part of the public records of the Department of Justice.

Q. I call your attention to a clause in the contract dated May 18, 1920, between the California & Hawaiian Sugar Refining Company and the Continental Candy Company of Chicago, the clause dealing with it being as follows:

“Clause 6. Buyer agrees to use the sugar only for his own manufacturing needs, and under no circumstances to resell the same.”

Did the Department of Justice at Washington, either through you or through anyone else connected with the Department of Justice, insist or even authorize, or insist upon or cause to be author-

(Deposition of J. G. Weatherly.)

ized or insisted upon, the issuance of such a clause in the contract for the sale of sugar in California.

A. No.

Q. At any time? A. Never at any time.

Q. I am going to call your attention to this clause, 7, of the sale contract:

“Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Sugar Refining Company from delivery date of these Java Whites until the end of the year.

Did the Department of Justice, on May 20, or on a subsequent date, did the Department of Justice authorize, insist upon, or purport to authorize or insist upon the insertion in [277] the contract for the sale of sugar in San Francisco?

A. No.

Q. Or anywhere else? A. No.

(The witness continuing:) I stated that I examined the files of the Attorney General's Office with reference to sugar at Mr. Fox's request. I did not find in the files of the Attorney General's office any correspondence at all from Mr. H. Clay Miller of San Francisco, or anybody connected with the Department of Justice, or the Bureau of Investigations, or Fair Price Committee of San Francisco, requesting authority to compel the insertion of these two clauses that I have just had read to me, Clauses 6 and 7 of that contract, in contracts at San Francisco for the sale of sugar. Those clauses were not inserted in any correspondence that I examined in the Attorney General's office.

(Deposition of J. G. Weatherly.)

Assuming that the Fair Price Committee of San Francisco, California, in May, 1920, would have requested permission or authority from the Attorney General's office for the insertion of either of these clauses in the contract for the sale of sugar, our Department would not have authorized the insertion of these clauses in any contract for the sale of sugar, for the reason that so far as any control was exercised it was exercised over the distribution of sugar. It is mostly in the licenses and regulations, and such a clause as that—I am referring to the first clause read, the first clause in the contract, "Buyer agrees to use this sugar only for his needs and under no circumstances will he sell the same," I would refer to the Committee that particular clause since it does not or is not used in connection with resales within the trade. It would directly conflict with the purpose of the Governmental control in that it would tend to interfere with the possible movement of the sugar to the consumer. In other words, [278] should the purchaser under that contract, and referring to that specific clause cited, finding himself with more sugar than his manufacturing purposes required, and sought to dispose of it to the consumer, he would be, if that clause were in the contract, I think he would be prevented from doing that very thing he intended should be done, and such a clause would be very much out of the public interest.

Mr. BALLOU.—(Interposing.) I object to that as a conclusion of law.

(Deposition of J. G. Weatherly.)

Mr. FOX.—Q. I want to call your attention, Mr. Weatherly, to what you referred to as the General Regulations, or were those regulations in general?

A. They were regulations wholly promulgated by the Food Administration.

Q. When? A. I do not recall the exact date.

Q. Was it about November, 1917?

A. Yes; about that time, and subsequently promulgated by the Department of Justice as rules and regulations to govern the dealings of sugar under the licensing provision of the Lever Law. These were promulgated by the Department of Justice after the enforcement of the Lever Law was delegated to the Department of Justice by the President in August, 1917, I think, or about that time—I do not mean 1917, I mean 1919. Some of these points, like this, I am trusting to memory entirely on that particular. Of course, I have not had them verified at all. It was about August, 1919.

Q. With reference to those various regulations covering the sale of sugar that were first promulgated, as you have stated, by the Food Administration— A. The Food Administration?

Q. The Food Administration, and subsequently enforced by the Department of Justice, the Attorney General's Office. I call your attention to what is known as Rule 7, "Speculation [279] prohibited"; and I call your attention to Rule 8, "Sales to speculators forbidden," and to one known as Rule 10, "Unfair practices forbidden." I shall

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read those various rules that I called your attention to. I will read Rule 7:

“Rule 7: Speculation Prohibited. No broker or other licensee shall buy or sell any food commodity for his own account unless he is also regularly engaged in, and holds himself out to the trade as conducting, the business of distributing such commodity otherwise than on a commission or brokerage basis, or unless he uses such commodities in manufacturing; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institutions.”

And Rule 8:

“Rule 8. Sale to speculators forbidden. No licensee shall knowingly sell any food commodity to a broker or other licensee who is not buying for personal consumption or engaged in using such commodity in manufacturing, or who is not regularly engaged in, and holding himself out to the trade as conducting, the business of distributing such commodity otherwise than on a commission or brokerage basis; provided that this rule shall not apply to sales on an exchange, board of trade, or similar institution.”

And Rule 10:

“Rule 10. Unfair practices forbidden. The licensee shall not buy, contract for, sell, store or otherwise handle or deal in any food commodities for the purpose of unreasonably increasing the price or restricting the supply of such commodities, or

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monopolizing or attempting to monopolize, either locally or generally, any of such commodities.”

Now, in reading those rules, Mr. Ballou, did I read those right? [280]

Mr. BALLOU.—I think, yes.

By Mr. FOX.—Q. With reference to those rules, Mr. Weatherly, were those rules invoked prior to May 30, or May 31st, 1920?

A. Well, those rules remained in force and effect until all license restrictions were withdrawn and outstanding licenses cancelled by a proclamation of the President, which I believe was in the month of November, I think November 15th.

Q. 1920? A. 1920, yes.

Q. I call your attention to one of those rules, Rule 6, which reads:

“Resales within the same trade without reasonable justification, especially if tending to result in a higher market price to the retailer or consumer, will be dealt with as an unfair practice.”

Mr. BALLOU.—I object to the reading of a part of a rule, unless the whole rule is read.

Mr. FOX.—I call your attention to that part of the rule, Mr. Weatherly. What is meant by the term, “within the same trade”; how did the Department construe “within the same trade”?

A. The Department construed the expression “re-sales within the same trade,” or the expression, “within the same trade” as relating to the selling by a dealer to another dealer in the same kind and the same class; that is, a transaction between two

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dealers performing identical functions so far as the public is concerned, such as the sale for the purpose of enhancing the price—say one wholesaler sells to another wholesaler, or one retailer to another retailer or even one broker to another broker, where it is for the purpose of aiding in absorbing or spreading out an exorbitant price or profit. [281]

Q. Was there ever any such sales within the same trade where the price at the time of the resale was less than the purchase price?

A. Bearing in mind the purpose of the Act we always construed it, the Department of Justice never objected to such resale. Will that answer?

Q. That answers my question. Was there ever any objection to a candy manufacturer reselling, for instance, one retailer selling to another retailer?

A. I think not if he was licensed, and the Department of Justice issued a great many licenses to candy manufacturers for the express purpose of enabling them to dispose of any surplus sugar they may have had for the benefit of the consumer.

On cross-examination, the witness testified:

I was in immediate charge of the Fair Price Committee during the dates that he specified. During that time the entire sugar business was done under licenses. Up to the President's proclamation, August, 1919, those licenses were issued by the Food Administration. Subsequent to that period of the proclamation they were issued by the Attorney General. And then previous to that time, the restrictions to the issuance of those licenses were per-

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formed by the Food Administration, and after that by the Department and the Attorney General. My particular department had nothing to do with the regulation and the licensing as distinguished from the formation of the Fair Price Committees. The matter of issuing licenses and regulations was primarily vested as to authority in the Attorney General, and I think I am correct in saying that by him the authority was delegated—no, that is not correct. Allison L. Newton was appointed by the Attorney General as the attorney in charge of the licensing division, and Mr. Newton had immediate charge of the [282] licensing. I should have to examine the proclamation of August, 1919, before stating whether the proclamation transferred the power and authority theretofore vested in the Food Administration to the Attorney General, because I am under the impression it is, but I could not say definitely without examining the proclamation and refreshing my memory.

Mr. BALLOU.—Q. I will call your attention to the certified copy I have of the proclamation signed November 21st, 1919, and particularly this language: “The powers and authority heretofore vested in the United States Food Administrator, under the authority of said Act of Congress approved August 10, 1917, and the executive orders and proclamations issued thereunder, in so far as they apply to foods, feeds, and their derivative products, other than wheat and wheat products, are hereby transferred to, and shall hereafter be exercised by the

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Attorney General of the United States, who shall supervise, direct and carry into effect the provisions of said Act, and the powers and authority therein given to the President, so far as the same apply to foods, feeds and their derivative products, other than wheat and wheat products, and to any and all practices, procedure, and regulations authorized or required under the provisions of said Act, including the issuance, regulation and revocation, in the name of the Attorney General of the United States, of licenses under said Act relating to foods, feeds and their derivative products other than wheat and wheat products; and in this behalf he shall do and perform such acts and things as may be authorized or required of him from time to time by direction of the President and under such rules and regulations as may be prescribed by the President from time to time." [283]

Are you familiar with the proclamation?

The WITNESS.—In a general way, yes.

(The witness continuing:) I think I have confused the two proclamations. As a matter of fact, I think this is the proper proclamation, and the one I was considering. As a matter of fact, the proclamation I have been testifying to, I think, upon my memory being refreshed now, is the proclamation of November 21, 1919 (a copy of the proclamation of November 21, 1919, was handed to the witness), I think this is the specific proclamation that transferred the powers, and that it is the one I have been referring to erroneously as of

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August, 1919. I don't know whether it is proper, or not, but I want to thank you for bringing that to my attention, because it was an inadvertent error. If it be permissible for me to explain now how that confusion came in my mind, the Department of Justice began its work really in advance of the transfer of the powers of the Food Administration for the purpose of getting things in shape, and because, I may say, they wanted to lose as little time as possible and to be ready to begin this work. They really began this work in August, and that is really an explanation of my confusion of the date. And, by the way, I would like to correct another answer I made a moment ago, Mr. Ballou. From September 1, 1920, to November 6, 1920, I was immediately associated with the licensing work, that is, the licensing division, if we may call it such, under the Department of Justice. In other words, I was transferred from the payroll of the Bureau of Investigation to the payroll of the Sugar Equalization Board. The Sugar Equalization Board was still in existence, but really exercising no powers, being that part of the officers of the Department of Justice who had charge of the work in connection [284] with the sugar licensing, and I was put on that roll September 1, 1920, and kept on it until I severed my connection with the Department, November 6, 1920; but during the month of May, 1920, I was not concerned immediately with the licensing provisions, that was not under my depart-

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ment. I was concerned with regulation of the licenses as prescribed in the proclamation only in this way, that the Fair Price Committees were charged with the duty of, as far as possible, seeing that the licenses conformed to the Rules and Regulations, and with that idea in mind I issued instructions. These particular instructions really went out over Howard Figg's signature, but I drew up the instructions to the Fair Price Committees, calling their attention to possible violations of the rules and regulations, and asking them to co-operate in ferreting out and bringing to the attention of the courts violations of the rules and regulations, and co-operate with the recognized officers of the Department of Justice in their districts, such as grand juries, United States Attorneys, and so on. These men were primarily concerned with any violations of the regulations, and the thing I did up to September 1, 1920, with regard to the Fair Price Committees, I merely instructed them to co-operate with them. The chain of authority through the immediate office of the Department of Justice, so far as the information regarding prices is concerned, the authority to prefer charges, and to make findings of fact as to the violations of license rules and regulations, went direct from the Attorney General to the United States Attorneys; they reported such findings of fact direct to the Attorney General, and such reports were passed upon by A. L. Newton, who approved or disapproved, as the

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case might be, and passed them on up for the attention of the Attorney General. [285]

Q. I call your attention to the first clause of Rule 6 of these general rules and regulations, reading as follows:

“The licensee, in selling food commodities, shall keep such commodities moving to the consumer in as direct a line as practicable, and without unreasonable delay.”

Mr. FOX.—Unless we agree, Mr. Ballou, that these regulations were in effect, I shall have to reserve an objection to reading any part of them.

Mr. BALLOU.—I will agree.

Mr. FOX.—I will agree.

Mr. BALLOU.—I am perfectly willing to go out and get certified copies of them. I have sent—

Mr. FOX.—It seems to me that in view of the fact that the depositions are to be taken, we ought to agree on what the facts were. I will agree that these regulations were in effect when you answer the other one.

Mr. BALLOU.—Well, we will presently put them all in. I have sent some certified copies to San Francisco, but we can agree among ourselves. We will agree then.

Mr. FOX.—I agree. Those are sections 6, 7, 8 and 10, as read, and those regulations were in effect in May, 1920.

The witness continuing:

Now, this business of keeping the goods moving to the consumer in as direct a line as practicable,

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and without unnecessary delay, was a part of the license rules and regulations as promulgated by the Department of Justice. We always held the consumer to be what is usually spoken of as the "ultimate consumer." I do not think we ever passed on that particular point of whether or not a candy manufacturing company would be considered a consumer of sugar under that clause. I do not remember that ever [286] having been raised. I think that it was understood that they always considered it an industry which should be given fair consideration under the law. But as I understood the regulations of the licensee, in selling sugar under that clause it was not under my particular department prior to September, 1920. We, that is, our Fair Price Committees and our department, did not endeavor to keep retail grocers who could not be licensed under the Act down to a fair margin of profit, because the Act, in limiting margins of profit, does not distinguish between a licensee and one who is not licensed, so they drew no lines.

The matter of fixing fair prices, which really, as I testified to, amounted to fixing fair margins of profit, was one which our particular department exercised through the Fair Price Committees, and licensed them or not, and that was done in a different department, in the Department of Justice, know that that point was raised and brought out, regulations of the licensees under those licenses.

I do not recall any particular occasion in May, 1920, when this matter of the wholesale clause, Rule

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6, came up in the Department of Justice, and was brought to our attention. My researches in the files of the Department did not make me familiar with any letter written by Howard Figg in the month of May, 1920, particularly referring to and quoting this wholesale clause handed to me here. I think my examination of the files would reveal such a letter if there had been one. I think my memory of the correspondence would, if that had come up. I think there is correspondence in the files along the line of calling upon the refiners to see that Section 6 is observed, and that there are no resales within the trade. I do not recall any particular letter by date, understand. I merely know that that point was raised and brought out, and that was in the correspondence files which I examined. [287]

Q. You testified that you would consider a proposition of resale, say, to the subject as contained in the clause, contrary to the public interests. Can you state along the same line whether you would consider the acquiring by a candy manufacturing company of more sugar than they needed for manufacturing in the nature of hoarding?

A. If it were deliberately required, if they acquired a surplus supply, an abnormal supply, yes, it would be.

The Department of Justice took steps to prevent such abnormal acquisition of supplies in excess of the real needs of the manufacturers who used sugar in their business, to the extent of warning the candy

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manufacturers against acquiring larger stocks than their business and conditions warranted, and to the extent of warning, or, rather, cautioning, or, better still, of asking the co-operation of the refiners in refraining from selling them an abnormal quantity of sugar, or quantities greater than their accustomed demands would warrant.

Now, on that point, whenever the Department of Justice wanted the co-operation of the refiners to do thus and so, and to refrain from doing thus and so, in order the more effectively to control the sugar situation in accordance with the Act, I, or the Fair Price Committee, or both, might call on the refiners in that matter, or it might come from the department, or the United States District Attorney, or Mr. Figg; it might be either the Fair Price Committee, or I had in mind the United States Attorney, or it might be either one, or both, would ask that co-operation. I, personally, never asked the co-operation of the refiners to do any acts or refrain from doing any acts, but the Fair Price Commissioners did occasionally call on them for assistance in certain matters. I think possibly by refreshing my memory from the book I gave you I can find the date on which [288] H. Clay Miller was appointed Fair Price Commissioner at San Francisco, California.

(The witness, after examining the book.) I do not have it here. I have a list of the Fair Price Commissioners here and I thought I had the date of their appointment, but I do not have it. I can

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say roughly, the best of my recollection was the late fall or early in the winter season of 1919. That is my best recollection of it. I know that we had a special representative on the Pacific Coast at about that time, and I think that he cleaned up the matter of organizing in California about that time.

On redirect examination by Mr. FOX, the witness testified:

A. L. Newton was stationed in Washington. He was not the District Attorney out in California, or in San Francisco; he was in the same relation as myself with Mr. Figg, associated with or assistant to Mr. Figg. I think maybe he was made special assistant to the attorney general about September 1, 1920. He is not connected with the department now, and I am not.

The case was then closed in so far as the introduction of testimony was concerned, and an adjournment was taken until Tuesday, December 28, 1920, at 8:30 o'clock A. M., for argument, and upon December 28, 1920, after an opening argument by John S. Partridge, Esq., on behalf of the plaintiff, and a reply thereto by Garret W. McEnenney, Esq., and Donald Y. Campbell, Esq., on behalf of the defendants, and a closing argument by John S. Partridge, Esq., the Court from the bench immediately rendered its oral opinion, and ordered a decree to be prepared so that it might be signed at 3 P. M. of the same day. The opinion was as follows: [289]

CONTINENTAL CANDY CORPORATION (a
Corporation),

Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY (a Corporation), et
al.,

Defendants.

Oral Opinion of the Court.

The COURT.—I have listened to you, gentlemen, with great earnestness and appreciation of your presentation of this case and also the presentation of your arguments in support of the theories entertained here. I suppose it ill becomes a mere country judge, for that is all that I profess to be, in the presence of such distinguished and able counsel, to question the thoroughness or the completeness of the argument, particularly in a case of this magnitude; but my own conscience is my mentor in all these cases, and I have to do and say the things which my conscience impels me to do and say. In that spirit I am emboldened to suggest that the controlling and decisive feature of this case has not been argued. Now, that is a bold and bald statement, but that seems to me to be the situation.

This sugar was bought in time of war,—war still existing legally, if not actually; we were surrounded and we were hampered by all of the exigencies and efforts and inconsistencies growing out of the

war and the resultant determination on our part to see that the war program was brought to a successful conclusion, and then that we were enabled to effect some sort of a satisfactory readjustment from our participation in the war. [290]

This contract is to be weighed and tested, not by what might have been the situation in the year 1913, or not what might be the situation fifty years hence, when the immediate economic effects of the war shall have passed into history, but what the situation was in the spring and summer of 1920.

The Sherman Anti-Trust Act has but recently been given very careful consideration by me, as I had occasion to indicate this morning, and I have given it the best thought I could under the circumstances obtaining. I confess that you can read certain decisions emanating from the most exalted tribunal in the world, respecting the Sherman Anti-Trust Act, and then you can read other decisions emanating from the same tribunal, and if you are only human you may be led to assert that they do not always seem to be consistent one with another.

But, aside from all other considerations, taking the decisions in the Tobacco case, the Standard Oil case, the Trans-Mississippi case, the Keystone Watch case, and even the Steel Trust case of last spring, as I read them and as I recollect them (remembering particularly the vehemence with which Mr. Justice Harlan dissented in some of those cases, and the approaching virulence with which he indicated that the Supreme Court was reading

into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "the rule of reason")—taking all those cases into consideration, and endeavoring to arrive at the proper path to be travelled by us in the construction of the Sherman Anti-Trust Act, it seems to me that the situation resolves itself to this much, clearly lying within the realm of legal indispute; irrespective of the precise and definite and seemingly controlling language of the [291] statute, as the same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, of which this is one, if it is anything at all, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree. The only way, or at least one of the most satisfactory ways, in which you can determine what is reasonableness or the unreasonableness of the restraint put upon trade by a contract, is to consider the motive and extent of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the end they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effect unreasonable. So measured and tested, if it was unreasonable upon its restraints upon trade,

it lies within the prohibitions of the Sherman Law; if not, otherwise.

It is common knowledge, I think, that during the war, and during the period subsequent to the actual cessation of hostilities, the question of the price, and the distribution, and the allocation of sugar in the United States, had been a question of a great deal of importance; it was a question that occasioned considerable thought on the subject-matter. I know that the exertions and the ramifications of the Department of Justice have been multitudinous to an extreme degree with respect to the question of what should be done about the sugar question, as well as how it should be done. In my own Court, during this very year, there have been at least two prosecutions for the sale [292] of sugar, and both of them anterior to the execution of this contract, and having to do with the alleged unlawfulness of the sale of sugar, at prices other than those fixed by Governmental authority; one case, in which there was a conviction, because the men evidently were endeavoring to profiteer upon that necessary of life, and in the other case there was an acquittal because, though the sugar had been sold at an advanced price, in excess of the price fixed by the controlling agency, there was lacking that intent sufficient to make it a criminal transaction, as the jury evidently viewed it. I call attention to these facts merely to indicate that there was a great deal of concern being manifested, publicly and privately, with respect to how sugar might be dealt with, to whom it might be sold, under what circumstances

it might be delivered to this, that and the other place, and the prices which might lawfully be exacted for it.

I know that down in Los Angeles—and I am assuming that the same conditions obtained here—for a long time sugar was sold only in small packages; you could get only one or two pounds at a time, and that, frequently, only in connection with a stated amount of other groceries. I know that I have made more than one journey to a grocery store, at the behest of my wife, to buy a lot of other things we did not need—at least at the moment—in order that we might become possessed of a sufficient amount of sugar to satisfy the requirements of the day. *So that everybody understood, whether it was lawful or unlawful, whether the Government had the power to impose restrictions and enforce them, or not, or whether we knew it all, or not, or whether we were proceeding along a path that was wrong economically; irrespective of what may have been the true solution of those problems and the true answers to those questions, we were going through a long and elaborate effort to endeavor to provide [293] our people with sufficient quantities of sugar to meet their requirements, the requirements of their normal appetites. At the same time, in the effort to accomplish that, we were limiting the sale, the transportation, the allocation of sugar very materially and substantially. And most people, I think, were accepting it in the same spirit with which it was tendered.

It is in evidence here that at the time these con-

tracts were made sugar was on a rising market,—and on a rising market due to a then present, or confidently expected, scarcity of sugar. It is obvious that that was the case; there was not enough sugar to go around. Some concerns, some individuals, or some territories had to be limited. I know that we had a Fair Price Commission down in Los Angeles, and they were very busily engaged in the matter; unusual efforts were being made to see, not that a few people got all of the sugar, but that everybody got some of the sugar, if that could be made possible. Under those circumstances, the Fair Price Committee in this community apparently—the United States Attorney acting in co-operation with the committee here indubitably—conveyed information to this vender of sugar that it might sell 10,000 tons of Java white sugar under certain limitations, the limitations contained in the contract.

It is of course difficult for one to read another's mind, but my own judgment is that the intent of the parties, particularly the Government agencies involved, no less than the aim and purposes of this clause in the contract was primarily, not to prevent the further disposition or the subsequent sale of this particular sugar, but to place such an inhibition upon its subsequent sale as that the buyer originally only buy the amount that he, himself, actually required; and it was in [294] furtherance of what I conceive to be a very commendable plan on the part of those who gave their best thought to the matter, that sugar should not be hoarded, should not be used

unwisely, and that concerns should not, in view of the growing scarcity, become possessed of amounts of sugar outside of and beyond their real requirements, and which they might thereafter, it being in excess of their requirements, make a sale of to their great profit and to the very considerable detriment of the purchasing public.

If this contract had been entered into in normal times, and if this defendant—this vender of sugar,—had inserted this clause in the contract with the intention on its part to prevent a subsequent sale of this sugar in order that it, itself, thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced here to the effect that it is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace, it is not a time for the normal operation of usual economic laws; it is a time of war, a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known, and it was a time when everybody was trying his best, was using his faculties to the very best advantage, to see if we might not be able to provide for the distribution of the necessities of life, of which sugar is one, in such form and fashion as to prevent some considerable menace to the maintenance of social integrity, social harmony and well-being in our midst.

People wanted sugar, as they wanted other things; and the aim [295] of the Government, which was concerning itself with the peace and quiet of its people, no less than in the maintenance of its perpetuity, obviously was to interest itself as best it might in the distribution of sugar, along with other things, in order that no substantial injustice might be done, and that the greatest number of people who were craving the article might meet with satisfaction.

Under these circumstances, the Government indicated to these parties that this sugar could be sold lawfully, and, therefore, sold at all, only if this clause providing for its use by the vendee and against its resale to any other person were inserted in the contracts. It seems to me that under such a state of facts, for this Court now to hold that the clauses thus inserted were unreasonable in their nature, so unreasonable as within the terms of the Sherman Anti-Trust Act to invalidate, and nullify, and render absolutely and completely void the entire contract, would be to attempt the consummation of a thing under the guise of law which really would have no law, or reason, or justice to support it, and would tend to make of this Government not a government of law, but a government of men.

There is no evidence in the case that I can see, of any attempt, any malevolent motive on the part of this vender of sugar, to do anything other than comply with what it and everybody else at the same time understood to be the lawful, and the reasonable, and the proper, and the apt demands of Gov-

ernmental authority. Under those circumstances, to hold that in so doing, it must, now in virtue of what has transpired, meet the loss that has been sustained here, an amount in excess of three hundred thousand dollars, would be to work out such an obvious injustice as to shake the very foundations of the social structure [296] which we have erected here in our midst, and undermine the confidence of men in government that it will see that private right is maintained and lawful engagements entered into are made good.

Now, the truth of the whole thing is easily apparent; this case is here because sugar went down and there was no thought of getting it here until sugar had gone down. If this contract was void—and that is the argument of counsel for the plaintiff—because of the inclusion of this clause in it, then, of course, it was wholly void—void at the behest of the defendant in the case; it would have been void in the event of a continued rise in the market, and a refusal on the part of defendant to deliver the sugar would have been void if the plaintiff had brought suit for damages for such refusal. If it was void in one case it was void in the other. I can but faintly imagine the vehemence that would have been indulged here in this Court in support of the argument on behalf of the present plaintiff that such a clause, entered into under such circumstances, should not suffice to enable one to escape the just consequences of his reasonable and voluntary engagements.

But the shoe is on the other foot; the price of

sugar having gone down, these people now seek to escape from the consequences of an unwise move on their part, the purchase of more sugar, really, than they needed in their business. The candy business also went down, as shown by the depositions here. There was less sugar needed by it after the purchase than previously. Not only was there less sugar needed, but there was more sugar to be had, and, therefore, the price went tumbling down. Five or five and a half months after the contract was entered into—five and a half months, after they had had time to look it over carefully, five and a half months, no doubt, [297] after it had been well thumbed by all of their various functionaries, for the first time they came to the conclusion that it was an unlawful contract, an invalid contract, one that shocks the public conscience and is opposed to public policy, one that would result in creating an unreasonable restraint upon trade; and after the sugar had been brought across the wide stretches of the sea and landed ready for delivery, and the price has gone down, and no opportunity to recoup at all any of the tremendous loss which might have been overcome if an intimation had been conveyed to the defendant three or four months previously, it is now proposed that this loss shall be borne, not by the buyer of the article who bought too much, but shall be borne by the seller of the article, who was merely trying to provide that which society was demanding of it, and in a way then deemed least inimical to the welfare of society.

Aside from the fundamental disposition which I think should be in the breast of every man who expects to engage and continue in business in the United States of America—the disposition to live up to his contracts once he has entered into them—I think there ought to be the further but equally prevalent disposition to take one's loss, when it comes, like a sport; and whether it be a loss of \$300,000, as here, or a loss of fifty cents—having over-purchased, having over-bought, having failed to guess with becoming perspicacity as to the future, if one would contribute something to the well-being of our civilization, he will not seek to avoid such a contract as that, one entailing a loss because of his want of foresight, because, forsooth, on the narrow ground that five months after he entered into it he got advice that it was unlawful. He should bear his loss—bear it like a man—even if the bearing of the loss means bankruptcy. [298] Unwelcome bankruptcy may be accepted with honor; unwarranted repudiation, however, is a continuing badge of dishonor. To do the honorable thing at all events, even in the face of loss, is a part of the game; it is a part of the burden. And it seems to me that it is the burden that ought to be maintained by the plaintiff in this case.

I am not so sure that this clause to which we have been referring is a severable clause. I have not had time to go into the authorities in respect to that. I entertain no final opinion respecting that phase of the case, but I am rather of the belief that with respect to a clause that in normal times would

be so closely allied to the prohibitions of the Sherman Anti-Trust Act, the Court should be loth to hold such a clause so at variance, seemingly, with the provisions of that act—aimed and intended to benefit the public—as a severable clause and one not sufficient, in itself, to invalidate the contract as a whole. But that becomes unnecessary further to consider, and need not enter into the determination of the case at this time, because of the reasons I have endeavored to state here, that, under the circumstances surrounding the transaction, the clause is in no wise an impingement of the law as laid down by the Supreme Court in its construction of the Sherman Act.

For these reasons, gentlemen, I am of the belief that there is no occasion or propriety for this Court at this time to seek to prevent the just consequences of this lawful engagement, lawfully entered into, from falling where they will.

The decree will be in the usual form. Counsel will prepare one, so that I may sign it and enter it this afternoon, before my departure.

The above opinion was revised and a statement of facts added, and in revised form appears in 270 Fed. page 302. [299]

After the opinion had been given the following colloquy occurred before the Court:

Mr. McENERNEY.—If your Honor please, in the final decree, will your Honor direct that the order for the temporary injunction of December 8th be vacated and set aside.

The COURT.—The decree will be in the usual form and you will prepare one so that I may sign it and enter it this afternoon before my departure from the city.

Mr. McENERNEY.—There are two or three other matters I would like to suggest to your Honor.

The COURT.—This case has now been heard upon its merits.

Mr McENERNEY.—Yes, your Honor, and I am speaking of a final decree.

The COURT.—That requires merely a dismissal of the bill.

Mr. McENERNEY.—There are two or three other matters that I think should be covered, for our full protection.

The COURT.—Probably so, and those will be taken care of if you incorporate them in the decree.

Mr. McENERNEY.—At what hour may we return here?

The COURT.—At two o'clock. Were you going to say something, Mr. Partridge? What were you going to suggest?

Mr. PARTRIDGE.—I was going to suggest, if your Honor please, that we be allowed a couple of days in order to notify the Chicago people with regard to this decision, in order that they may take such steps as they may be advised. Mr. Fox is here from Chicago, representing the regular attorneys for the Company in Chicago. Mr. Brown has been in charge of the case, but he was not able to be here at this hearing. Mr. Lillick and myself are not advised as to what steps they may wish to take.

[300] The letters of credit do not expire until Friday night.

Mr. McENERNEY.—It will not answer our purpose, if your Honor please, if your Honor should leave here without entering the final decree. It was distinctly engaged upon your Honor's categorical and explicit question that this case should be finished to-day and decided by your Honor, as you intended to go home. Time is running. Inadvertencies might occur. The Continental Candy Company can be advised of this decision and it can take any course that it pleases. We ask that the order of December 8, 1920, granting an injunction, be vacated and set aside; that the final decree contain an order that the defendant will be permitted to move against the National Surety Company under its undertaking filed herein December 8, 1920, as it may be advised, and that the final decree shall operate to transfer to our client and to reinvest it with whatever rights were by it transferred to Mr. Maling, and that, in addition, that at its request, Mr. Maling be authorized and directed to execute an appropriate or necessary instrument to evidence or to effect that reinvestment. Those are the three things, your Honor, in addition to the formal final decree, we would like to have your Honor enter therein. I may say to your Honor that we have a rule of court here which provides that every undertaking must contain a clause wherein the obligor agrees that any party to the action may on a ten day notice apply to have its liability adjudged and the amount fixed and

a judgment entered for that amount, and in an opinion by Mr. Justice Brandeis in 243 U. S., be upheld a similar clause and in a footnote cites all of the statutes and decisions where those clauses come into effect. That would be an appropriate provision to insert here at the foot of this decree. We ask [301] that if your Honor please, so that it shall not be hereafter argued, that by entering the final decree it was intended to cut off that right.

We wish this afternoon to present to the San Francisco banks our letters of credit and the shipping documents so that nothing shall happen to breach this engagement.

We got notice on December 1st that they repudiated their contract and they brought this suit and tied us up. Now the day of reckoning has arrived, your Honor has reached a conclusion, and we ask that judgment be entered in accordance with the conclusion which your Honor has reached.

Mr. PARTRIDGE.—Of course the defendant is entitled under your Honor's belief, supported by your reasons given, to a judgment, but I will submit that there is no necessity of any such haste as counsel suggests. This plaintiff is two thousand five hundred miles away. I will submit that a delay of a couple of days is not an unreasonable delay to ask.

The COURT.—Let me ask you this, Mr. Partridge. What could the plaintiff do?

Mr. PARTRIDGE.—I suppose they could arrange for their appeal. Perhaps make an application to the Court for a *supersedeas*. I am not ad-

vised as to everything that might be done.

The COURT.—Of course that is true, and if the Circuit Court of Appeals should grant the *supersedeas*—that would be for them to determine. This Court has said now and is firmly of the belief that you are not entitled to the equitable relief that you seek here, and that the equitable relief which heretofore has been granted to you has been granted improperly. That is the present belief of the Court.

Mr. PARTRIDGE.—Very true, your Honor; but in all cases, with deference to your Honor, there are differences of [302] opinion.

The COURT.—I understand that. I understand that mistakes have been made.

Mr. PARTRIDGE.—Yes, your Honor, and that is the reason why there are courts of appeal established by the Government and by the State.

The COURT.—Do you know of any instance though where the trial Court discharged an injunction or declined to grant an injunction, that the Circuit Court of Appeals has granted an injunction?

Mr. PARTRIDGE.—I do know of a great many in the State Courts, your Honor. Your Honor will remember that in the Pasadena case there was an injunction continued in force to maintain the *status quo* pending appeal.

The COURT.—I don't know what the attitude of the defendant might be. Of course I have never regarded myself as infallible, and I might be mistaken in this instance. If some sort of an agreement could be made whereby this money could be

deposited with the Court and some arrangement made to take care of interest on it until the matter is adjudicated, I have no doubt that such an arrangement as that could be made here. I do not know but what the defendant would be willing to make such an arrangement. I do not know anything about it. But I suppose it might be willing to co-operate to any reasonable degree. They are entitled to the money and they are entitled to its use under the views of this Court.

Mr. McENERNEY.—But if they appeal, and if your Honor is wrong, we are amply able to respond. That is all there is to it.

The COURT.—But there is a question though as to whether [303] or not if they should appeal this particular case and it should be determined that this Court is wrong, there is a question, I say, whether or not that would give them the relief financially which they seek.

Mr. McENERNEY.—I cannot conceive, if your Honor please if it were adjudged at the moment they filed the bill that they were entitled to relief *pendente lite* through the mistakes of a judicial officer, the money passed into the hands of the defendant, the defendant would not be liable for it under settled usages and principles. And in paragraph 3 of their Bill of Complaint they proceed on that assumption, if your Honor please, because they ask that if the money be paid *pendente lite*, they be awarded it.

The COURT.—I think that under accepted principles of law they have a valid cause of action at

law here if their contention be a rightful one.

Mr. McENERNEY.—There is a celebrated case on that subject, your Honor.

The COURT.—That is my own belief. Of course, the element in this case—and I didn't take time to go into it because it was unnecessary—which should claim the attention of the chancellor is that the sum involved is so large that the deprivation of that sum to the plaintiff might, if the contract be ultimately held to be an unlawful one, work such irreparable injury to the plaintiff that a court of equity should step in and intercede. It is my present belief that that is the theory on which the bill could be maintained if the plaintiff made a case.

Mr. McENERNEY.—On the other hand, your Honor, the same burden would be on us; the need of the money. [304]

The COURT.—But from what you just said, Mr. McEnerney, I have come to the conclusion that money is the least of your trouble. I thought your great trouble was sugar.

Mr. McENERNEY.—No, your Honor, money is our greatest trouble, because sugar is unsalable at the present moment.

The COURT.—Well, what do you want to do?

Mr. PARTRIDGE.—We would be very glad to have the money paid in to the Clerk of the court; if not that, then we would certainly like to have it so that the order dissolving the temporary restraining order and the entry of the decree be continued at least until to-morrow, so that we can get in tele-

graphic communication with the Chicago people.

Mr. McENERNEY.—We object to that.

The COURT.—Would that embarrass you at all?

Mr. McENERNEY.—We have three days, your Honor, and they are very busy days.

The COURT.—Today is Tuesday. This Court could enter a decree, providing that this present writ of injunction becomes *functus officio*, to-morrow at 12 o'clock noon; of course the defendant is entitled to a decree, that much cannot be gainsaid. Do you agree at all to the suggestion that the money be deposited with the Court?

Mr. McENERNEY.—No, your Honor, at this point of time we do not wish to make any such arrangement as that.

Mr. LILLICK.—Our bond is good, your Honor.

Mr. McENERNEY.—I don't want the Candy Company. I don't know whether it is in financial distress, or not. It is currently reported that its chief stockholder is, a man who is currently reported to be its chief stockholder.

Mr. LILLICK.—I mean the National Surety Company. [305]

Mr. PARTRIDGE.—Mr. Lillick is talking about the surety company.

The COURT.—But it is not a question of bonds, it is a question of money, real money.

Mr. LILLICK.—If the money is paid into Court, the Surety Company certainly would be good for the interest, there is no chance of it getting away; the only question is the interest.

Mr. McENERNEY.—We have tried this case, your Honor, we have been awarded a final decree.

The COURT.—Do you feel, Mr. McEnerney, as a man and as a citizen—do you feel that it is impossible to arrive at any understanding whereby the money might be deposited in Court pending a decision of this matter on appeal?

Mr. McENERNEY.—Yes, your Honor.

The COURT.—Well, that is your right.

Mr. PARTRIDGE.—It is equally the right of the Court then to direct in the decree that the injunction be continued in force for a sufficient length of time to enable us to communicate with Chicago, and I will submit to your Honor that that is only fair.

The COURT.—Of course this matter has to move quickly. Sentimental considerations should not be permitted to interfere with a businesslike adjustment of the problem in hand.

Mr. PARTRIDGE.—The thing that is asked for, the main purpose of the bill is to prevent the valuing-under these letters of credit. An appeal would be rendered entirely useless if the money is paid over, and I will submit, if your Honor please, that under the terms of the letters of credit they are good and the banks will pay under them until midnight of the [306] last day of the year, that is Friday, and that no possible harm can come to these gentlemen by a continuance of the restraining order until at least to-morrow.

Mr. McENERNEY.—I would hate to go down to the Bank of California at 10 o'clock on Friday

night to get this money. The whole point is this, if your Honor please; we submit that as your Honor has ordered a final decree that brings the restraining order to an end. They have had it since the 8th of the month. It is now the 28th. They have had it for twenty days; they have had full opportunity to present this matter. Your Honor has ruled that they are not entitled to any rights. We ask a final decree be entered in the usual form and that it carry the three provisions I have named; first, that the order of December 8, 1920, be vacated and set aside, which would probably be the effect of the final decree without specific mention; secondly, that we be permitted as we may be advised to move against the National Surety Company; and, third, that the decree operate by virtue of its own force, to reinvest us with the interests transferred to Mr. Maling, and that he be authorized, ordered and directed to give us appropriate and necessary writings to evidence that reinvestment.

The COURT.—Of course two of these are beyond question. Have you any objection to a provision in the decree that the injunctive order shall be discharged as of to-morrow at 12 o'clock?

Mr. McENERNEY.—Well, if your Honor feels that that is appropriate to the occasion, we will submit to it.

The COURT.—I think it is not inappropriate.

Mr. McENERNEY.—We will submit to it.

Mr. PARTRIDGE.—In regard to the provision in the decree respecting the Surety Company, what was your idea about [307] that, Mr. McEnerney,

what kind of an order there should be in the decree?

Mr. McENERNEY.—I want to say something like this: there is hereby reserved to the defendant Sugar Refining Company the right to move against the National Surety Company as it may be advised. That is simply to say in the provision that the decree does not cut us off from that relief.

Mr. PARTRIDGE.—You are entitled to that, but it is absolutely unnecessary.

The COURT.—Perhaps it is, but it doesn't do you any harm.

Mr. PARTRIDGE.—Not at all.

The COURT.—So you don't object to it?

Mr. McENERNEY.—We have made and executed orders to Mr. Maling. We want the decree by virtue of the situation, *ex proprio vigore*, to reinvest us.

The COURT.—That would be proper.

Mr. PARTRIDGE.—Mr. Fox suggests that, inasmuch as he wants to go back to Chicago, that notice of your intended movement in regard to the Surety Company be served before he goes.

Mr. McENERNEY.—I want to see first what damage we have sustained. We must give a ten days' notice. We might not serve you with any notice for some time yet to come, but you would have ten days' notice when we did. We can move in a year if we want to.

The COURT.—Yes, or four years. The statute of limitations is the only limit upon your right. We will take a recess until 3 o'clock.

Thereafter, and at 3 o'clock in the afternoon, the decree was presented to the Court for signature and the same was signed and filed. [308]

Stipulation of Counsel Settling Evidence Under Equity Rule 75.

It is hereby stipulated by and between the appellant and appellees, that the foregoing constitutes a true and complete statement of the evidence pursuant to said Equity Rule 75, and with the original exhibits mentioned in the foregoing statement, and to be made a part of the transcript of record herein, constitutes all of the evidence introduced in the above-entitled action; and

It is hereby further stipulated that the foregoing statement may be settled, allowed, approved and filed in the above-entitled action and be printed in the transcript to be prepared on appeal in this action.

Dated December 28th, 1921.

JOHN S. PARTRIDGE,
IRA S. LILLICK,
CHARLES LE ROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Appellant.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for Appellee, California & Hawaiian
Sugar Refining Company.

H. U. BRANDENSTEIN,
Attorney for Canton Bank. [309]

**Order Approving Statement of Evidence Under
Equity Rule 75.**

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled, allowed and approved as a true and correct statement of the evidence pursuant to Equity Rule 75.

Dated December 30, 1921.

BLEDSON,
Judge.

Receipt of a copy of the within statement of evidence is hereby admitted this 4th day of January, 1922.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for C. & H. S. R. Co.
H. U. BRANDENSTEIN,
Attorney for Canton Bank.

[Endorsed]: Filed Jan. 5, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [310]

(Title of Court and Cause.)

Petition for Appeal.

To the Honorable Judge of the United States District Court for the Southern Division of the Northern District of California.

The above-named James B. A. Fosburgh, trustee of the estate of Continental Candy Corporation, a corporation, a bankrupt, plaintiff, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 28th day of December,

1920, does hereby appeal from said decree to the Circuit Court of Appeals for the 9th Circuit, for the reasons set forth in the assignment of errors herewith filed and it prays that its appeal be allowed and that citations be issued as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

JOHN S. PARTRIDGE,
IRA S. LILICK,
CHARLES LE ROY BROWN,
BROWN, FOX & BLUMBERG,
Solicitors and Attorneys for Plaintiff.

Receipt of a copy of the within petition for appeal is hereby admitted this 25th day of June, 1921.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for California and Hawaiian Sugar
Refining Company.

CUSHING & CUSHING,
Attorneys for The First National Bank of San
Francisco.

H. U. BRANDENSTEIN,
Attorney for Canton Bank.

[Endorsed]: Filed June 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [311]

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia, Second Division.

IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate
of CONTINENTAL CANDY CORPORA-
TION, a Corporation, a Bankrupt,
Plaintiff and Appellant.

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY, a Corporation, THE
FIRST NATIONAL BANK OF SAN FRAN-
CISCO, CALIFORNIA, a Corporation, and
CANTON BANK, a Corporation.

Respondents and Appellees.

Assignment of Errors.

Comes now the plaintiff, James Fosburgh, trustee
in bankruptcy of Continental Candy Corporation, a
corporation, in the above-entitled cause, and files the
following Assignment of Errors, upon which he will
rely upon his prosecution of the appeal in the
above-entitled cause from the decree made by this
Honorable Court on the 28th day of December,
1920.

1.

That the United States District Court for the Northern District of California, Second Division, erred in rendering its opinion and making its order and decree [312] dismissing plaintiff's bill of complaint in this case, and that defendants have and recover their costs to be taxed.

2.

That the said Court erred in deciding and decreeing that the plaintiff was not entitled to any form of equitable relief under the allegations and prayer of the plaintiff's bill of complaint.

3.

That the said Court erred in making its decree dismissing plaintiff's bill of complaint, and in determining that the facts proved and established on the trial did not warrant the Court in granting any form of equitable relief to the plaintiff, and ordering that defendants have and recover their costs to be taxed.

4.

That the Court erred in deciding and determining that the facts proved and established on the trial did not make out a *prima facie* case in favor of plaintiff, and entitling it to the relief prayed for in its bill of complaint.

5.

That the said Court erred in deciding and determining that the order of temporary injunction dated, made and filed herein on December 8, 1920, should, at twelve o'clock noon of Wednesday, December 29, 1920, stand vacated and set aside.

6.

That the said Court erred in deciding and determining that the order of temporary injunction dated, made and filed herein on December 8, 1920, should stand vacated and set aside. [313]

7.

That the said Court erred in deciding and determining that leave should be reserved to the defendants to proceed herein against the National Surety Company upon its undertaking filed herein upon December 8, 1920, as said defendants might be advised.

8.

That the said Court erred in deciding and determining that its decree made, entered and filed herein upon the 28th day of December, 1920, should operate as an assignment by Walter B. Maling to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling, individually, or to said Walter B. Maling, Special Master, or to said Walter B. Maling, Special Master, for the purposes specified in the order of temporary injunction dated, made and filed herein on December 8, 1920, by three certain instruments dated December 22, 1920, by each of which said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction and the bill of complaint herein.

9.

That the said Court erred in deciding and determining that its decree made, entered and filed herein upon the 28th day of December, 1920, should have the effect of an assignment by Walter B. Maling to the defendant California and Hawaiian Sugar Refining Company of all rights and interests transferred by it to said Walter B. Maling, individually, or to [314] said Walter B. Maling, Special Master, or to said Walter B. Maling, Special Master, for the purposes specified in the order of temporary injunction dated, made and filed herein on December 8, 1920, by three certain instruments dated December 22, 1920, by each of which, said California and Hawaiian Sugar Refining Company directed the payment to said Walter B. Maling in any one of the three capacities aforesaid, of a draft drawn by it (there being three drafts in all) against the letters of credit mentioned in the said order of injunction, and in the bill of complaint herein.

10.

That the said Court erred in deciding and determining that the said Walter B. Maling, individually, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction, dated December 8, 1920, be empowered and directed, if and when requested so to do by the California and Hawaiian Sugar Refining Company, to execute any instruments necessary or appropriate, or believed by the California and Hawaiian Sugar Refining Company to be necessary or ap-

propriate, to evidence, or effect, the retransfer to it of the rights and interests transferred by it to said Walter B. Maling, individually, and in his several capacities above mentioned by the instruments of December 22, 1920, referred to above.

11.

That the said Court erred in empowering and directing Walter B. Maling, individually, and Walter B. Maling, Special Master, and Walter B. Maling, Special Master for the purposes specified in the said order of temporary injunction, dated December 8, 1920, if, and when, requested so to do, by [315] the California and Hawaiian Sugar Refining Company, to execute any instruments necessary or appropriate, or believed by the California and Hawaiian Sugar Refining Company to be necessary or appropriate, to evidence or effect the retransfer to it of the rights and interests transferred by it to said Walter B. Maling, individually, and in his several capacities above mentioned, by the instruments of December 22, 1920, above referred to.

12.

That the Court erred in deciding and determining that the defendant California and Hawaiian Sugar Refining Company, and all other persons acting with it, should not be enjoined from delivering to plaintiff, or offering to deliver to plaintiff, the sugar, or any part thereof, referred to in the contracts annexed to the bill of complaint on file herein.

13.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company and all other persons acting with it, from delivering to plaintiff, or offering to deliver to plaintiff, the sugar, or any part thereof, referred to in the contracts annexed to the bill of complaint on file herein.

14.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from valuing or drawing under the letters of credit mentioned in the bill of complaint herein.

15.

That the Court erred in refusing to enjoin the [316] defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from negotiating or assigning any drafts drawn under the letters of credit mentioned in the bill of complaint herein.

16.

That the Court erred in refusing to enjoin the defendant, California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the defendant The First National Bank of San Francisco, California,

of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

17.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the defendant Canton Bank, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

18.

That the Court erred in refusing to enjoin the defendant California and Hawaiian Sugar and Refining Company, its officers, servants, members and agents, and all other persons acting with or for it, from taking or receiving payment under [317] the letters of credit, or any of them, mentioned in the bill of complaint herein, from the First National Bank of Chicago, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

19.

That the Court erred in refusing to enjoin the defendant, California and Hawaiian Sugar Refining Company, its officers, servants, members and

agents, and all other persons acting with or for it, from taking or receiving payment under the letters of credit, or any of them, mentioned in the bill of complaint herein, from the Great Lakes Trust Company, of the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein.

20.

That the Court erred in refusing to enjoin the defendant, The First National Bank of San Francisco, California, its officers, servants, agents and members, and all other persons acting with or for it, or aiding or assisting them, or any of them, from paying the defendant California and Hawaiian Sugar Refining Company the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein, under the letters of credit, or either of them, referred to in said bill of complaint.

21.

That the Court erred in refusing to enjoin the defendant, Canton Bank, its officers, servants, agents and members, and all other persons acting with or for it or aiding [318] or assisting them, or either of them, from paying the defendant California and Hawaiian Sugar Refining Company the purchase price of and for the sugar, or any part thereof, mentioned in the contracts, copies of which are annexed to the bill of complaint herein, under

the letters of credit, or either of them, mentioned in said bill of complaint.

22.

That the Court erred in deciding and determining that the contract of sale of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, was not illegal, null and void.

23.

That the Court erred in deciding and determining that the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, was not illegal, null and void.

24.

That the Court erred in deciding and determining that the contract of sale of May 14, 1920, between the plaintiff and defendant California and Hawaiian Sugar Refining Company should not be cancelled and rescinded.

25.

That the Court erred in refusing to cancel and rescind the contract of sale of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company.

26.

That the Court erred in deciding and determining that the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company [319] should not be cancelled and rescinded.

27.

That the Court erred in refusing to cancel and rescind the contract of sale of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company.

28.

That the Court erred in deciding and determining that the clause in said contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not a condition in said contract in unreasonable and unlawful restraint of trade, and the contract, therefore, illegal, null and void.

29.

That the Court erred in deciding and determining that the clause in said contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not a condition in said contract in unreasonable and unlawful restraint of trade, and the contract, therefore, illegal, null and void.

30.

That the Court erred in deciding and determining that the clause in the contract, under date of May

14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, providing that the sale of said sugar to [320] plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of therein as the "delivery date" of such sugar until the end of the year 1920, did not constitute the said contract one in unreasonable and unlawful restraint of trade, and, therefore, illegal, null and void.

31.

That the Court erred in deciding and determining that the clause in the contract, under date of May 18, 1920, between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of therein as the "delivery date" of such sugar until the end of the year 1920, did not constitute the said contract one in unreasonable and unlawful restraint of trade, and, therefore, illegal, null and void.

32.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 14, 1920, was not illegal, null and void because of the restriction therein against, and the forbidding therein of, the resale by the plaintiff of the sugar, or any part thereof, mentioned therein.

33.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 18, 1920, was not illegal, null and void because of the restriction [321] therein against, and the forbidding therein of, the resale by the plaintiff of the sugar, or any part thereof, mentioned therein. [322]

34.

That the Court erred in deciding and determining that the contract, under date of May 14, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not illegal, null and void because of the provision therein forbidding the sale of any more, or other, sugar in addition to the amounts and quantities specified therein by defendant California and Hawaiian Sugar Refining Company to plaintiff prior to the end of the year 1920.

35.

That the Court erred in deciding and determining that the contract, under date of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not illegal, null and void because of the provision therein forbidding the sale of any more, or other, sugar in addition to the amounts and quantities specified therein by defendant California and Hawaiian Sugar Refining Company to plaintiff prior to the end of the year 1920.

36.

That the Court erred in deciding and determining that the provision in the contract between the plaintiff and defendant California and Hawaiian Sugar Refining Company, of May 14, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states, or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States. [323]

37.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, of May 18, 1920, providing that plaintiff should use the sugars covered by said contract only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states, or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

38.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that the sale of the sugars therein mentioned to plaintiff, constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of as the "delivery date" of such sugar until the end of the year 1920, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

39.

That the Court erred in deciding and determining that the provision in the contract between plaintiff and defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that the sale of the sugars therein [324] mentioned to plaintiff, constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of as "delivery date" of such sugar until the end of the year 1920, was not in violation of the anti-trust laws of the United States forbidding contracts in restraint of trade among the several states or with foreign nations, and forbidding restraint of lawful trade, or free competition in lawful trade, or commerce of any article imported or intended to be imported into the United States.

40.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, and the terms and conditions thereof, were not in such unreasonable and unlawful restraint of trade as to be at variance with, and contrary to, public policy and interest, and unreasonable and detrimental to the plaintiff and to the interest and policy of the public at large, and in unqualified restriction of trade in a necessary commodity dealt with in trade and commerce among the several states, and, for those reasons illegal, null and void.

41.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, and the terms and conditions thereof, were not in such unreasonable and unlawful restraint of trade as to be at variance with, and contrary to, public policy and interest, and unreasonable and detrimental to the plaintiff and to the interest and policy of the public at large, and in unqualified restriction of trade in a necessary commodity with in trade and commerce among the several states, and, for those reasons illegal, null and void. [325]

42.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Ha-

waiian Sugar Refining Company, under date of May 14, 1920, in so far as they provided that the sugars covered by said contract should only be used by plaintiff for its own manufacturing needs, and under no circumstances was plaintiff to resell the said sugar, or any part thereof, were not illegal, null and void because they effected a withholding and removing of a necessary commodity from the public market and from the public use, and because they restricted the freedom of trade for the benefit of the public, and the public interest, and created a tendency to the maintenance of high prices of and for such necessary commodity, and a monopolistic inflation and raising of price of and for sugar.

43.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, in so far as they provided that the sugars covered by said contract should only be used by plaintiff for its own manufacturing needs, and under no circumstances was plaintiff to resell the said sugar, or any part thereof, were not illegal, null and void because they effected a withholding and removing of a necessary commodity from the public market and from the public use, and because they restricted the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for such necessary commodity, and a

monopolistic inflation and raising of prices of and for sugar. [326]

44.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 14, 1920, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of therein as the "delivery date" of such sugar, until the end of the year 1920, were not illegal, null and void, and effected a withholding and removing of said necessary commodity from the public market and from the public use and restricted the freedom of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for sugar, and a monopolistic inflation and raising of prices of and for the same.

45.

That the Court erred in deciding and determining that the provisions of the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, under date of May 18, 1920, providing that the sale of said sugar to plaintiff constituted plaintiff's entire quota of sugar from the said defendant from what was spoken of therein as the "delivery date" of such sugar, until the end of the year 1920, were not illegal, null and void, and effected a withholding and removing of said necessary commodity from the public market and from the public use and restricted the freedom

of trade for the benefit of the public and the public interest, and created a tendency to the maintenance of high prices of and for sugar, and a monopolistic inflation and raising of prices of and for the same.

46.

That the Court erred in deciding and determining that the [327] contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 14, 1920, is not entirely and wholly illegal, null and void because of the provision constituting an integral part of said contract, providing that all disputes and controversies thereunder should be finally settled by a prescribed arbitration, extra legal in character, the effect of which provision was and is to oust the courts of jurisdiction, and in deciding and determining that said provision was not contrary and inimical to the public interest and welfare, and the whole contract, therefore, null and void.

47.

That the Court erred in deciding and determining that the contract between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated May 18, 1920, is not entirely and wholly illegal, null and void because of the provision constituting an integral part of said contract, providing that all disputes and controversies thereunder should be finally settled by a prescribed arbitration, extra legal in character, the effect of which provision was and is to oust the courts of jurisdiction, and in deciding and determining that said provision was not contrary and

inimical to the public interest and welfare, and the whole contract, therefore, null and void.

48.

That the Court erred in deciding and determining that the contract under date of May 14, 1920, between the plaintiff and the defendant California & Hawaiian Sugar Refining Company, was not *nudum pactum*, unenforceable, and null and void because it was unilateral and without mutuality and in that it gave the said defendant the privilege of cancelling the said contract if strikes, wars, revolutions, accidents, dangers of the seas, or other unforeseen [328] events beyond control, prevented shipment or delayed delivery of the sugar.

49.

That the Court erred in deciding and determining that the contract under date of May 18, 1920, between the plaintiff and the defendant California and Hawaiian Sugar Refining Company was not *nudum pactum*, unenforceable, and null and void because it was unilateral and without mutuality, in that it gave the said defendant the privilege of cancelling the said contract if strikes, wars, revolutions, accidents, dangers of the seas, or other unforeseen events beyond control, prevented shipment or delayed delivery of the sugar.

50.

That the Court erred in deciding and determining that the notice by the plaintiff to the defendant California and Hawaiian Sugar Refining Company, of the termination and cancellation of the contract dated May 14, 1920, was not valid and did not

thereby relieve the plaintiff from any further obligation thereunder.

51.

That the Court erred in deciding and determining that the notice by the plaintiff to the defendant California and Hawaiian Sugar Refining Company, of the termination and cancellation of the contract dated May 18, 1920, was not valid and did not thereby relieve the plaintiff from any further obligation thereunder. [329]

52.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void because they were in violation of the Sherman Anti-Trust Act.

53.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs, and under no circumstances to resell the said sugar, or any part

thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Wilson Tariff Bill.

54.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar or any part thereof, were not integral [330] parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Clayton Act.

55.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Lever Act, and the amendment thereto, dated December 31, 1919.

56.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated respectively May 14, 1920, and May 18, 1920, providing that plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Cartwright Act.

57.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, [331] respectively, May 14, 1920, and May 18, 1920, providing that the plaintiff should use the sugars covered by said contracts only for its own manufacturing needs and under no circumstances to resell the said sugar, or any part thereof, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Sherman Anti-Trust Act.

58.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale

of the sugar therein mentioned to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugar until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void because they were in violation of the Sherman Anti-Trust Act.

59.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant, California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, [332] and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Wilson, Tariff Bill.

60.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff

constituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Clayton Act.

51.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff constituted plaintiff's quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole were illegal, null and void, because they were in violation of the Lever Act, and the amendment thereto dated December 31, 1919. [333]

62.

That the Court erred in not deciding and determining that the clauses in the contracts between the plaintiff and the defendant California and Hawaiian Sugar Refining Company, dated, respectively, May 14, 1920, and May 18, 1920, providing that the sale of the sugars therein mentioned to plaintiff con-

stituted plaintiff's entire quota of sugar from the defendant California and Hawaiian Sugar Refining Company from what was spoken of in said contracts as the "delivery date" of such sugars until the end of the year 1920, were not integral parts of said contracts, and that, therefore, the contracts as a whole, were illegal, null and void, because they were in violation of the Cartwright Act.

63. (Exception No. 1.)

The Court erred in overruling plaintiff's objection to the following question asked the witness, Andrew A. Brown by Mr. McErnerney in cross-examination:

"Q. Was that the only motive of your company in requiring the buyer to agree that it was for his own consumption, and not for the purpose of resale?"

and in permitting the witness to answer:

"A. As far as I know, it was merely trying to follow out the rules of the Department of Justice."

64. (Exception No. 2.)

The Court erred in overruling the objection of plaintiff to the introduction in evidence by the defendant of a certified copy of a letter by Howard Figg, Esquire, Special Assistant to the Attorney General, written to the American Sugar Refining Company, April 29, 1920, which is set out in the Answer of the California and Hawaiian Sugar Refining Company, and which [334] referred to a certain Rule 6 of the Food Administration, in which the

Rule 6 of the Food Administration, in which the said Special Assistant stated he would insist upon a strict enforcement of Rule 6, and in permitting the defendant to introduce said letter in evidence.

65. (Exception No. 3.)

The Court erred in sustaining the objection of defendant California and Hawaiian Sugar Refining Company to the following question, asked the witness Andrew A. Brown, on redirect examination by Mr. Partridge:

“Q. Under what kind of an arrangement does the California and Hawaiian Sugar Refining Company refine the raw sugar produced by these plantations?” [335]

WHEREFORE, the appellant prays that said decree be reversed and that said District Court for the Northern District of California, Second Division, be ordered to enter a decree reversing the decision of the lower court in said cause and entering therein such decree as will afford the appellant adequate relief and take such further proceedings herein as are according to the principles of law and equity.

JOHN S. PARTRIDGE,
IRA S. LILICK,
CHAS. LeROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Appellant.

Receipt of a copy of the within Assignment of Error is hereby admitted this 25th day of June, 1921.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,

Attorneys for Appellee, California and Hawaiian
Sugar Refining Company.

CUSHING & CUSHING,
Attorney for Appellee, The First National Bank of
San Francisco, California.

H. U. BRANDENSTEIN,
Attorney for Appellee, The Canton Bank.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [336]

(Title of Court and Cause.)

Order Allowing Appeal.

On motion of Messrs. John S. Partridge, Ira S. Lillick and Charles LeRoy Brown, solicitors and attorneys for plaintiff, it is hereby—

ORDERED that an appeal to the Circuit Court of Appeals for the 9th Circuit from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Circuit Court of Appeals for the 9th Circuit.

It is further ORDERED that the bond on appeal be fixed at the sum of five hundred dollars (\$500).

Dated June 27th, 1921.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [337]

(Title of Court and Cause.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That James B. A. FOSBURGH, Trustee of the
Estate of Continental Candy Corporation, a cor-
poration, as principal, and Globe Indemnity Com-
pany, a surety, are held and firmly bound unto the
defendants in the sum of Five Hundred (\$500)
Dollars, lawful money of the United States, to
be paid to them and to their successors and assigns,
which payment, well and truly to be made, we
bind ourselves and each of us jointly and severally
and each of our heirs, executors, administrators,
successors and assigns firmly by these presents.

Sealed with our seals and dated this 27th day of
June, 1921.

WHEREAS the above-named James B. A. Fos-
burgh, Trustee of the Estate of Continental Candy
Corporation, a corporation, a bankrupt, has pros-
ecuted an appeal to the United States Circuit
Court of Appeals for the Ninth Circuit to reverse
the judgment and decree of the District Court of
the United States for the Northern District of
California in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, shall prosecute his said appeal to effect and answer all costs if he fails to make good his plea and appeal, then this obligation to be void, otherwise to remain in full force and effect.

JAMES B. A. FOSBURGH,
Trustee of the Estate of Continental Candy Corporation, a Corporation, a Bankrupt,

(Seal)

By IRA S. LILLICK,

Its Attorney.

GLOBE INDEMNITY COMPANY. (Seal)

By H. M. PARSONS, Surety,

Attorney in Fact. [338]

State of California,

City and County of San Francisco,—ss.

On this 27th day of June, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a notary public in and for the City and County of San Francisco, personally appeared H. M. Parsons, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Globe Indemnity Company, and acknowledged to me that he subscribed the name of Globe Indemnity Company thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in

the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 12, 1925.

Approved this 27th day of June, 1921.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jun. 27, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [339]

(Title of Court and Cause.)

**Plaintiff's Amended Praecept for Transcript on
Appeal.**

To Walter B. Maling, Clerk of the District Court
Above Named:

You will please prepare the record for the transcript to be printed in the above-entitled action on appeal to the Circuit Court of Appeals for the Ninth Circuit, and incorporate in the transcript of record the following papers:

1. Bill of complaint.
2. Process.
3. Marshal's return.
4. Motion of California & Hawaiian Sugar Refining Company to dismiss bill of complaint.
5. Answer of First National Bank of San Francisco.
6. Answer of California and Hawaiian Sugar Refining Company.

7. Oath of office of special master.
8. Opinion of District Judge upon final hearing.
9. Final decree.
10. Marshal's return of service of copy of final decree.
11. Stipulation and order substituting John Fosburgh as plaintiff in place and stead of Continental Candy Corporation.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignment of errors.
15. Citation on appeal.
16. Bond on appeal and approval.
17. Statement of evidence under Equity Rule 75.
18. All stipulations and orders made and filed on or subsequent to June 27th, 1921, relative to settlement of statement of evidence under Equity Rule 75 and any stipulations and orders [340] relative to preparation of record.
19. Stipulation of counsel supplying evidence under Equity Rule 75.
20. Order approving statement of evidence under Equity Rule 75.
21. Clerk's certificate to transcript.
22. Order sending up original exhibits.

Yours respectfully,

JOHN S. PARTRIDGE,

IRA S. LILLYCK,

CHAS. LeROY BROWN,

BROWN, FOX & BLUMBERG,

Attorneys for Plaintiff and Appellant.

Received copy of plaintiff's within praecipe for transcript on appeal this — day of August, 1922.

DONALD Y. CAMPBELL,

GARRET W. McENERNEY,

Attorneys for California and Hawaiian Sugar Refining Co.

H. U. BRANDENSTEIN,

Attorney for Canton Bank.

[Endorsed]: Filed Aug. 28, 1922. Walter B. Maling, Clerk. [341]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

IN EQUITY—No. 579.

JAMES B. A. FOSBURGH, Trustee of the Estate
of CONTINENTAL CANDY CORPORATION,
a Corporation, a Bankrupt,
Plaintiff,

vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY, a Corporation, et al.,
Defendants.

Stipulation and Order Concerning Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED between the attorneys for the respective parties hereunto that the originals of all the exhibits, copies of which are set forth in the Statement of

Evidence on appeal in the above-entitled cause, may be lodged with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for such use as may be provided by law.

Dated: August 29th, 1922.

JOHN S. PARTRIDGE,
IRA S. LILLYCK,
CHAS. LeROY BROWN,
BROWN, FOX & BLUMBERG,
Attorneys for Plaintiff.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for Defendant California and Hawaiian
Sugar Refining Co.

It is so ordered.

HUNT,
District Judge.

[Endorsed]: Filed Aug. 29, 1922. Walter B. Maling, Clerk. [342]

(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred forty-two (342) pages, numbered from 1 to 342, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on appeal, as the same

remains on file and of record in this office, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$152.00; that said amount was paid the plaintiff and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of August, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [343]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States to California and Hawaiian Sugar Refining Company, a Corporation, The First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein

James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a corporation, a bankrupt, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, designated to hold and holding the United States District Court for the Northern District of California, this 27th day of June, A. D. 1921.

FRANK S. DIETRICH,
United States District Judge. [344]

Received copy of the within citation this 27th day of June, 1921.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for California and Hawaiian Sugar Refining Co.

CUSHING & CUSHING,
Attorneys for First National Bank of S. F.
H. U. BRANDENSTEIN,
Attorney for Canton Bank.

[Endorsed]: No. 579. United States District Court for the Northern District of California. James B. A. Fosburgh, Trustee, Continental Candy Corporation, etc., Appellant, vs. California and Hawaiian Sugar Refining Co. et al., Appellees.

Citation on Appeal. Filed Jun. 27, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3921. United States Circuit Court of Appeals for the Ninth Circuit. James B. A. Fosburgh, as Trustee of the Estate of Continental Candy Corporation, a Corporation, Bankrupt, Appellant, vs. California and Hawaiian Sugar Refining Company, a Corporation, The First National Bank of San Francisco, California, a Corporation, and Canton Bank, a Corporation, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 1, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

JAMES B. A. FOSBURGH, Trustee of the Estate
of CONTINENTAL CANDY CORPORA-
TION, a Corporation, a Bankrupt,
Plaintiff and Appellant,
vs.

CALIFORNIA AND HAWAIIAN SUGAR RE-
FINING COMPANY, a Corporation, et al.,
Defendants and Appellees.

**Stipulation and Order Extending Time to and In-
cluding September 15, 1922, to File Record
and Docket Cause.**

It is hereby stipulated and agreed by and be-
tween the respective parties hereto that the appel-
lant above named may have to and including the
15th day of September, 1922, within which to file
his transcript of record on appeal in the above-en-
titled action.

Dated: August 30, 1922.

JOHN S. PARTRIDGE,
IRA S. LILICK,
Attorneys for Appellant.

DONALD Y. CAMPBELL,
GARRET W. McENERNEY,
Attorneys for Appellee California and Hawaiian
Sugar Refining Co.

H. U. BRANDENSTEIN,
Attorney for the Canton Bank.

By the Court: It is so ordered.

Dated: Aug. 30, 1922.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: 3921. In the United States Circuit Court of Appeals for the Ninth Circuit. James B. A. Fosburgh, Trustee of the Estate of Continental Candy Corporation, a Bankrupt, Plaintiff and Appellant, vs. California and Hawaiian Sugar Refining Company, a Corporation et al., Defendants and Appellees. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Sept. 15, 1922, to File Record and Docket Cause. Filed Aug. 30, 1922. F. D. Monckton, Clerk. Refiled Sep. 1, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.